[redacted]

(26,258)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 791.

THE WASHINGTON POST COMPANY, PETITIONER,

vs.

JOHN ARMSTRONG CHALONER.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 1, 1918.

a

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

October Term, 1916.

No. 3025.

THE WASHINGTON POST COMPANY, a Corporation, Appellant,

vs.

JOHN A. CHALONER.

Appeal From the Supreme Court of the District of Columbia.

Office Supreme Court, U. S. Filed Dec. 17, 1917. James D. Maher, Clerk.

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Court of Appeals of the District of Columbia.

No. 3025.

THE WASHINGTON POST COMPANY, a Corporation, Appellant,

vs.

JOHN A. CHALONER.

Supreme Court of the District of Columbia.

At Law 52406.

JOHN A. CHALONER, Plaintiff,

vs.

THE WASHINGTON POST COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Declaration.

Filed February 26, 1910.

In the Supreme Court of the District of Columbia.

Law. No. 52406.

JOHN A. CHALONER, Plaintiff,

vs.

THE WASHINGTON POST COMPANY, a Corporation, Defendant.

The plaintiff, John A. Chaloner, formerly known as John A. Chanler, sues the defendant for that whereas, the plaintiff is and was at the time of the committing of the grievances hereinafter complained of a well known member of the Chanler family the members whereof are well and favorably known in the state of New York, the District of Columbia, the states of Virginia, North Caro-
2 lina, and elsewhere in the United States; and for that the plaintiff was always reputed among the citizens of the District of Columbia as well as among other citizens of the states hereinbefore mentioned and other states of the United States of America to be upright, honest, just and lawful and law-abiding in his daily living and conduct.

Yet the defendant well knowing the premises but contriving and intending to deprive the plaintiff of his said good name, credit and reputation, and to bring him into scandal and disrepute among his friends, neighbors and acquaintances and to hinder and impede him in the assertion of his property and personal rights in certain litigation now pending by him in the city and state of New York wherein was and is involved, as the defendant well knew title to valuable real estate and his right to his personal liberty in the city and state of New York falsely and maliciously composed and published and caused to be composed and published of and concerning the plaintiff in a certain newspaper of large circulation throughout the United States, and especially in the District of Columbia, and the states hereinbefore named on Saturday, April 3, 1909, the following false, scandalous, defamatory and malicious libel, to wit:

"John Armstrong Chaloner (Chanler) (meaning the plaintiff), brother of Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home.

Following the shooting, Chaloner suffered a nervous breakdown, and was ordered by his physician to take a long rest. He decided

to visit his old friend, Maj. Emry, who, with Chaloner, was instrumental in founding Roanoke Rapids, a manufacturing town 5 miles from Weldon. Chaloner arrived at Weldon after traveling all night and was immediately hurried to Shadeland, where he received medical attention and temporary relief."

The said defendant meaning and intending by said false, scandalous and malicious libel to charge the plaintiff with the crime of murder in the killing of one John Gillard when on the contrary the fact was as defendant well knew, that while the plaintiff was engaged in a most laudable effort to prevent the said Gillard from murdering his wife, and although the said plaintiff purposely refrained from shooting said Gillard as plaintiff was well justified in doing, the said Gillard was in fact killed by accidental explosion of a pistol which the said Gillard was endeavoring to wrest from the grasp of plaintiff in order that the said Gillard might with the said pistol murder his wife, so that in truth and fact as the defendant well knew plaintiff was entitled to the highest credit for his courage and chivalrous conduct in the premises.

By means of the publishing of which said false, scandalous and malicious libel and libelous matter by the defendant, the plaintiff was not only hurt and prejudiced in his good name, fame
3 credit and esteem among the citizens of the District of Columbia, the states of New York, Virginia and North Carolina and elsewhere, but has also fallen into great discredit among them and will be greatly hindered and impeded in the assertion by the judicial proceeding aforesaid of his right to his property and to his personal liberty in the state of New York because the tendency of the said libel was and is to create the impression in the minds of great numbers of persons who have read the same that the said plaintiff is mentally irresponsible and has dangerous and homicidal tendencies all of which the defendant knew to be untrue, and for that the publication of the aforesaid libel among good and worthy citizens of the District of Columbia and of the localities hereinbefore mentioned, to whom the innocence of the plaintiff in respect to said offenses and misconduct so as aforesaid mentioned and charged upon and imputed to the plaintiff was unknown, will by reason of the committing of the said several grievances by the defendant cause the plaintiff to be suspected and believed by said good and worthy citizens to have been guilty of the offenses and misconduct so as aforesaid mentioned charged upon and imputed to the plaintiff, whereby the plaintiff has been brought into public shame, infamy and disgrace without the slightest justification or reason as the defendant well knew at the time of the publication of the aforesaid libel whereby the plaintiff has been greatly injured.

Wherefore the plaintiff brings this suit and claims damages in the sum of $50,000 besides costs.

WM. E. AMBROSE,
JNO. RIDOUT.

Plea.

Filed February 14, 1917.

* * * * * * *

Now comes the defendant and for plea to the Declaration filed in the above entitled cause, says that it is not guilty in manner and form as therein alleged.

WILTON J. LAMBERT,
Attorney for Defendant.

Joinder of Issue.

Filed February 24, 1911.

* * * * * * *

The Plaintiff joins issue on defendant's plea.

W. E. AMBROSE,
JOHN RIDOUT,
Attorneys for Plaintiff.

4 *Additional Plea.*

Filed February 18, 1916.

* * * * * * *

Now comes the defendant by its attorney, leave of court to file same having been first had and obtained, and for further plea to the declaration filed in the above entitled cause says:

(2) And for a further plea in this behalf defendant says that the said plaintiff ought not to have or maintain his aforesaid action against it, the defendant, because the said defendant says that the article and words complained of by the plaintiff in the declaration are true in substance and in fact according to the natural and ordinary signification and without the meaning imputed to them in the several in-uendoes contained in the said declaration.

Wherefore the defendant at the time mentioned in the said declaration, published of and concerning the plaintiff the said several words in the said declaration mentioned, as it was lawful for it to do, for the cause aforesaid, and this the defendant is ready to verify.

Wherefore defendant prays judgment if the plaintiff ought to have his aforesaid action against it, etc.

WILTON J. LAMBERT,
Attorney for Defendant.

Memorada.

February 18, 1916.—Joinder to stand to additional plea.
February 23, 1916.—Verdict for Plaintiff for $10,000.00.

Motion for New Trial.

Filed February 28, 1910.

Now comes the defendant and moves the Court to set aside the verdict rendered in the above entitled cause and to grant it a new trial upon the following grounds:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to the weight of the evidence.
3. That the verdict is contrary to law.
4. Because of errors committed by the Court in admitting over objections and exceptions certain testimony offered by the plaintiff.
5. Because of error committed by the Court in refusing to admit in evidence certain testimony offered by the defendant, including certain newspaper articles or publications appearing prior to the time of the publication of the article complained of herein.
6. Because of error in granting prayers on behalf of the plaintiff.
7. Because of error in refusing the prayers offered by the defendant.
8. Because of errors of law committed by the Court in its charge to the jury.
9. Because of error committed by the court in holding that the article sued upon was libelous per se, and that as matter of law, it charged the plaintiff with the crime of murder in the first or second degree.
10. Because the verdict of the jury is excessive.
11. Because the jury was manifestly swayed by passion and prejudice against the defendant.
12. Because the verdict on its face must have been based on the theory of punitive damages against the defendant.

WILTON J. LAMBERT,
Attorney for Defendant.

To Mr. E. F. Colladay, et al., Attorneys for Plaintiff:

Take notice that the aforegoing will be for hearing before Mr. Justice Stafford on Friday, the 3rd day of March, A. D., 1916.

WILTON J. LAMBERT,
Attorney for Defendant.

Supreme Court of the District of Columbia.

Friday, April 14th, 1906.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys, whereupon it is ordered that the motion for a new trial heretofore submitted, be and the same is hereby overruled and judgment on ver-

dict is ordered. Wherefore, it is considered that the plaintiff herein recover of the defendant the sum of Ten thousand dollars ($10,000.00) for his damages as heretofore assessed, with interest from this date, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing the defendant by its attorney in open court, notes an appeal to the Court of Appeals, whereupon, the penalty of a bond to operate as a Supersedeas is hereby fixed in the sum of Twelve Thousand Dollars.

Memoranda.

April 14, 1916.—Supersedeas bond approved and filed.

May 26, 1916.—Bill of Exceptions submitted.

Time to file transcript of record extended to and including July 3, 1916.

June 26, 1916.—Time to file transcript of record extended to and including August 7, 1916.

July 25, 1916.—Time to file transcript of record extended to and including September 1, 1916.

6 *Assignment of Errors.*

Filed August 24, 1916.

* * * * * * *

The court erred as follows:

1. In permitting the witnesses, Dabney and Thurman, to testify to the reputation of the plaintiff.

2. In permitting the witness, Thurman, to testify to the condition of the head and body of Mrs. Gillard.

3. In permitting the witness, Thurman, to describe the tongs used in assaulting Mrs. Gillard.

5. In refusing to permit the witness, Chaloner, to be examined not he excepted to accounts carried in the Post as well as the Washington Times on or about March 16th and 17th, 1909.

5. In refusing to permit the witness, Claloner, to be examined relative to escapades and episodes of shooting up automobiles and automobile travellers.

6. In refusing to admit in evidence parts of the article appearing in The Washington Post on March 17th, 1909, relating to the *the* occurrence at Merry Mills on March 15th, 1909.

7. In refusing to admit in evidence articles appearing in the Washington Times of date March 17th, 1909.

8. In refusing to admit in evidence article appearing in the Evening Star of March 17th, 1909.

9. In refusing to permit the witness, Spurgeon, to testify as to whether there was any intent to charge Chaloner with the crime of murder, etc., in publishing the article of April 3rd, 1909.

10. In refusing to admit in evidence that part of the article appearing in the Washington Post on March 17th, 1909, as set forth in the

bill of exceptions and stating as follows: "Mrs. Gillard's oldest son corroborated her, etc."

11. In refusing to admit in evidence photograph of plaintiff taken while on horseback.

12. In refusing to permit the plaintiff to be interrogated as to his ability to be thrown into a trance as shown by the offer of proof in the bill of exceptions.

13. In refusing to grant defendant's motion for a directed verdict.

14. In granting plaintiff's fifth prayer.

15. In refusing to grant defendant's first, second, third, fourth, fifth, sixth, eighth and ninth prayers individually.

16. In charging the jury that the article complained of was libelous per se.

17. In overruling defendant's motion for a new trial.

WILTON J. LAMBERT,
Attorney for Defendant.

Service of copy of the foregoing acknowledged this 21st day of August, A. D., 1916.

E. F. COLLADAY,
Attorney for Plaintiff.

7 *Designation of Record.*

Filed August 24, 1916.

* * * * * * *

The Clerk of the court will include in the transcript of record on appeal in the above entitled cause the following:

1. Declaration filed February 26th, 1910.
2. Defendant's plea filed February 14th, 1911.
3. Joinder of issue filed February 24th, 1911.
4. Defendant's second plea filed February 18th, 1916.

MEMO. Joinder to stand to second plea.

MEMO. Verdict returned February 23rd, 1916.

5. Motion for new trial filed February 28, 1916.

MEMO. Motion overruled and judgment on verdict, appeal noted and supersedeas bond fixed at $12,000.

MEMO. Supersedeas bond approved April 14th, 1916.

MEMO. Bill of exceptions submitted May 26th, 1916.

MEMO. Bill of exceptions approved October 4, 1916.

MEMO. Time to file record in Court of Appeals extended from time to time to October 16, 1916, incl.

6. Assignment of errors.
7. This designation of record.

WILTON J. LAMBERT,
Attorney for Defendant.

Service accepted Aug. 21, 1916.

E. F. COLLADAY,
Att'y for Plaintiff.

Memoranda.

August 30, 1916.—Time to file transcript of record extended to and including September 18, 1916.

September 15, 1916.—Time to file transcript of record extended to and including October 16, 1916.

Supreme Court of the District of Columbia.

Wednesday, October 4, 1916.

Session resumed pursuant to adjournment, Hon. F. L. Siddons presiding.

Before Mr. Justice Stafford.

* * * * * * *

The Court having this day signed the Bill of Exceptions heretofore submitted, as of the time of the noting thereof at the trial, now, hereby orders the same of record nunc pro tunc.

8 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 11, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52406 At Law, wherein John A. Chaloner is Plaintiff and The Washington Post Company, a corporation is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 5th day of October, 1916.

[Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

In the Supreme Court of the District of Columbia.

At Law. No. 52406.

JOHN ARMSTRONG CHALONER

vs.

THE WASHINGTON POST COMPANY.

Bill of Exceptions.

Be it remembered, that on the trial of this cause, before Mr. Justice Stafford, beginning on the 17th day of February, 1916, the

plaintiff, to maintain issues on his part joined, offered in evidence a printed copy of the Washington Post of April 3, 1909, containing the following article:

"John A. Chaloner Ill.

"Suffers Breakdown as Result of Gillard Tragedy While Visiting Friend."

"Special to The Washington Post.

"Richmond, Va., April 2.—John Armstrong Chaloner (Chanler), brother of Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home.

9 "Following the shooting Chaloner suffered a nervous breakdown, and was ordered by his physician to take a long rest. He decided to visit his old friend, Maj. Emry, who, with Chaloner, was instrumental in founding Roanoke Rapids, a manufacturing town five miles from Weldon. Chaloner arrived at Weldon after travelling all night, and was immediately hurried to Shadeland, where he received medical attention and temporary relief."

Whereupon, to further maintain issues on his part joined, the plaintiff offered as a witness ARCHIBALD D. DARNEY, residing at Charlottesville, Virginia, Judge of the Corporation Court of that city, who testified that he was acquainted with the plaintiff and had been his counsel; that Charlottesville is in the same county as Mr. Chaloner's residence, namely, Albemarle County; that he has known Mr. Chaloner between ten and fifteen years.

Thereupon the witness was asked what his, Chaloner's, reputation was in the community for peace and good order; to which question counsel for the defense objected on the ground that evidence of general reputation is not permissible as part of the plaintiff's case in chief. This objection was overruled by the Court, to which action of the Court in overruling said objection counsel for the defendant asked an exception, which exception was then and there entered upon the minutes of the Court.

Thereupon, the witness answered as follows:

"His reputation for peace and good order is excellent.

"The Court: This, of course, relates to the time of the publication, not to the present time.

"The Witness: At that time it was excellent."

The witness was referring to April 3, 1909 and March 17, 1909. The witness further testified that the plaintiff's social standing was that of a high-toned, honorable gentleman, in that community at the same time.

On cross examination the witness testified that he had no personal knowledge about the reputation of the plaintiff except since the plaintiff had been in the State of Virginia.

Thereupon, to further maintain issues on his part joined, the plaintiff called as a witness Dr. FRANCIS LEE THURMAN, who testified that he resided at Keswick, Virginia; was a physician, practising since 1894; was present at the coroner's inquest over the body of John Gillard in the month of March 1909, as an assistant in the inquest, in performing the post-mortem; assisted Dr. Mann Page in the autopsy; a gunshot *would* was the cause of his death; it was located in the left temple. It went across the brain from the left temple over to the opposite side, upwards and lodged under the skull on the opposite side according to the direction of the probe when entered there; it did not come through the skull; has been knowing the plaintiff, Mr. Chaloner, a long time, and his social status previous to and since March and April 1909; knows other people who know it.

10 Thereupon the witness was asked the following question:

"Doctor, at that time, did you know Mr. Chaloner and his neighbors, and what his reputation was among those neighbors? A. Yes.

Q. Will you please state to the jury what it was?"

To which question counsel for the defendant objected, which objection the Court overruled, to which action of the Court in overruling said objection an exception was asked by the defendant, which exception was thereupon then and there entered upon the minutes of the Court.

"A. How is that question, now?

"By the Court:

"Q. What his reputation was in the community among his friends and neighbors and acquaintances, all the people in the community? A. He had an honorable, upright reputation among his neighbors, considered as a man of first class character, a man of broad charities"——

Mr. Lambert: I object.

The Court: That will be enough.

Thereupon the witness was further asked:

"What was his reputation for peace and good order? A. I never heard it questioned."

Thereupon counsel for the defendant moved to strike out the last answer as not being competent, which motion was overruled, to which action of the Court in overruling said motion the defendant asked an exception, which exception was then and there entered upon the minutes of the Court.

Thereupon the witness further testified that he made an examination of Mrs. Gillard, the wife of the man who was killed, assisting Dr. Mann Page. He was then asked the following question:

"What was the condition of her head, of the wounds, and of her body?"

To which question counsel for the defendant objected.

"The Court: Did you do that immediately after this affair occurred? A. The next day.

"The Court: Will there be other evidence tending to show that the condition she was in was the result of this affair?
"Mr. Dudley: Yes, sir.
"The Court: Other witnesses will testify to that?
"Mr. Dudley: Yes, sir.
"The Court: I think it is part of the affray itself.

"Whereupon counsel for the defendant stated that his objection was based upon the ground that the nature or extent of her injuries was not something pertinent to the issues involved; which objection was by the court overruled, to which action of the court in overruling exception was then and there entered upon the minutes of the court.

11 "Thereupon the stenographer repeated the question as follows:

"Q. What was the condition of her head, of the wounds, and of her body?"

Thereupon the witness answered as follows:
"There were seven or eight wounds on her head, I do not remember exactly which; I think seven. They were parallel wounds, having been made apparently with a pair of tongs, it seemed to be, and the two tines striking at the same time, the wounds were parallel. Five of these were mere contusions. Two of the wounds, the scalp was broken, and blood had exuded from these wounds. It was very sensitive, very tender, very much swollen. We proceeded to remove the hair, shaved the would and dressed it antiseptically."
Thereupon the witness was asked if he saw any tongs there that had the appearance of being used in a scuffle, to which the witness replied, "Oh, yes."
Thereupon the witness was asked the following question:
"Q. Could you describe those tongs to the jury, their weight and size?"

"Mr. Lambert: This is the gravamen of my objection to this situation: we admit that there was a fight there, a tussle, abuse of this woman, an attempted assault by the husband, and that the general affray took place. It seems to me it is exactly like a situation where a collision is admitted. The evidence as to details in connection with it becomes irrelevant then to the case. I cannot see any use spending time on it, as to whether she had two wounds or three wounds or five wounds, or whether it was done with a hammer or tongs or two pair of tongs or what not. The situation is, we do not dispute the tussle took place.
"The Court: This whole case turns on what happened there that

day. We cannot shut out any proper evidence as to what the occurrence actually was. You may proceed.

"A. I do not know what they would weigh. It strikes me as being about two feet long, with a good pair of long tines to them."

To the action of the Court in overruling the objection of the defendant, the defendant then and there asked an exception, which exception was then and there duly entered upon the minutes of the Court.

The witness further testified, in answer to the last question, that they were a pair of wood tongs; that is, for handling wood, were made of iron; the tines were of iron; they were pretty heavy tongs, and the tines were probably as large as his finger. The witness further indicated to the jury how long they were; they were tongs used in handling logs or blocks of wood for the fire-place.

On cross-examination the witness was asked the following question:

Q. You do not know that you have ever talked with anybody about the question of his reputation for peace and good order at all.

A. He has always had a good reputation for peace and good order.

12 Thereupon the plaintiff, to further maintain the issues on his part joined, offered as a witness JOHN GRADY, colored, who testified that in the months of March and April 1909, he was employed by Mr. Chaloner as body servant and cook; on the fifteenth day of March, 1909, he was at the wood pile cutting wood between the hours of eleven and twelve o'clock; that Mrs. Gillard came up to the wood pile and spoke to him; she then went to Mrs. Carney: Mrs. Edward Carney. He saw her again after she went into Mrs. Harry Carney's; they are white people who work for Mr. Chaloner. and are married. Thereafter she came back to see the witness, and witness went to Mr. Chaloner's house, The Merry Mills with her; witness admitted her into the house; witness made a fire in the dining room where Mrs. Gillard had entered; after making the fire he went through the house doing his usual work that he did every day; after finishing his work he called Mr. Chaloner, who was in his bed room; this was about two o'clock; that Mrs. Gillard wanted to see him; Mr. Chaloner said he would be down in ten minutes, and he went back to the dining room and told Mrs. Gillard; Mr. Chaloner came down in ten minutes, and when witness got back to the room, he saw Mr. Chaloner getting up from the floor; that he got his lunch at two o'clock; while witness was at lunch Mr. Gillard came in from towards the gate, going towards the house. Witness went out to meet him, and Gillard asked if Mrs. Gillard was there; told him "yes, sir" to go right in, in a smiling way which he had been usually doing in coming there; Gillard went up the steps into the dining room, and the witness went back to the kitchen to finish his lunch; heard a noise in the dining room, and rushed up to the dining room at a very fast gait, and Mr. Gillard was saying to his wife—before

witness got into the dining room he heard him say to his wife, "What are you doing here? What are you doing here? Come away from here. Come away from here." Mrs. Gillard said, "I will not go back with you. I will not go back with you. I followed you back the third time. The fourth time I will not go back with you."

Witness thought he would not interfere, with a man and his wife but went back to kitchen to finish his lunch. Thereafter he heard Mrs. Gillard screaming and hollering in the dining room, so he rushed up there as fast as he could, meeting Mr. Money at the dining-room door. Witness further testified as follows:

"Mr. Money went into the dining-room on one side and I on the other. Mr. Money taken hold of Mr. Gillard, Mrs. Gillard lying kneeling down on the floor, moaning and groaning. Mr. Chaloner was getting up from the floor, with his hand on the back of his head, in his stocking feet. Mr. Money saying to Mr. Gillard, "Oh, yes; oh, yes; I see you are a wife beater, a wife beater. We have got you now. We have got you now." Then Mr. Chaloner walked towards Mr. Gillard, after getting up out of the corner, saying to Mr. Gillard "You be quiet. You be quiet. You be quiet. I am not going to hurt you, and see that you don't hurt anyone." Mr. Gillard said, "That's all right." Then Mr. Chaloner taken his revolver out of his hind pocket, walking toward Mr. Gillard, taking his
13 hand off of the muzzle, saying, "I am not going to shoot you. I am not going to shoot you. You be quiet." And Mr. Chaloner told me to go out and get the men on the place. I told him there were no men there, they were all out."

Witness further testified that Mr. Chaloner wanted the men to give help in the dining-room; Mr. Chaloner then told him to get a rope out of the guest chamber and tie up Gillard, and send him to Charlottesville and have him sent to jail. The witness further testified:

"I went up in the guest chamber and got a rope, and while I was up there in the guest chamber, where he usually keeps his clothes on the clothes line, I began to take this line down, this clothes line down, and lay his clothes on the bed. I got the line down and before I started down the steps I heard a noise over in the office, and I went over to the office to see what this noise were. I found Mrs. Gillard's little girl in the office, and I started out and I heard the report of a gun, and she said to me, "Oh, is he killed?"

Witness further testified that he started out of the office with the rope and down the stairs, and when he got downstairs found Gillard lying on the floor flat on his back; the rope dropped out of witness' hand, and Mr. Chaloner said, "That is all right John. Let it lie just where it is. Gillard is dead. He shot himself."

"Mr. Lambert: I object and move to strike that out.

"The Court: We will take that up a little later, Mr. Lambert. It has been said. It cannot be unsaid. We will consider your motion a little later. Go on.

"The Witness: He got shot——

"The Court: Do not state anything further that Mr. Chaloner said; go on and tell what was done.

"Mr. Dudley: The witness is with you, Mr. Lambert."

On cross examination the witness was asked, "When you came in there with the rope how far did you get into the room before you saw what the situation was?" and answered, "Right at the door." Mr. Chaloner was standing up about three or four feet from Gillard; did not see the pistol at that time; as far as he can recollect Chaloner had some books and papers in his hands at that time; did not see the pistol in either one of Mr. Chaloner's hands; saw it before he went out of the dining-room, in Mr. Chaloner's hand; saw Chaloner draw it out of his right hip pocket; Mr. Chaloner had the pistol in his hand when witness went out under instructions to get a rope, and was shaking it in his hand and told Gillard he was not going to shoot him; the barrel was toward Gillard; does not remember next seeing it; was excited when he saw Gillard on the floor apparently dead; he was bleeding at the time; when he went out to get the rope, besides Gillard and Chaloner there were Mr. Money, Gillard's wife and children in the same room; when he got back the same people were there as when he went out except that Gillard was down on the floor dead; Mrs. Gillard was sitting down by the dining-room table; Gillard was lying on the floor near the south corner in the
14 dining-room, about five feet from where Mrs. Gillard was sitting; Gillard did not have anything in his hand. Witness first heard the short after he got the rope unfastened in the guest chamber.

When he showed Gillard up to the steps, he had left Mrs. Gillard and her five children in the dining room, and Mr. Chaloner was not there. When he heard the conversation in which Mrs. Gillard said she would not go back for the fourth time, Mr. Gillard and his wife and children were in the dining room, and no one else; had told Mr. Chaloner to come downstairs, but he had not come; Gillard had been coming there, but was not working on the place; on the day of the shooting Gillard came there about 3 o'clock in the afternoon, first knew Gillard about a year or over; he lived about four and one half or five miles from Chaloner's place; was a tall man, but not quite as tall as Mr. Chaloner; he is a man about fifty-one or fifty-two—a young man.

In the dining room were a side-board, dining room table, screen, and wooden box and bus-table, and three chairs. After he heard the scream, the furniture was all right except the screen had been knocked round; it was a paper screen, and had been setting before the dining-room door, standing up; the corner was knocked around, but it was still standing; there was a pair of tongs, and when he came back after obtaining the rope, there was a poker disarranged; there was no other furniture not in its usual position or condition, tongs were lying on the floor, and there was some hair on the tongs, and they were bent, the handle in that direction (indicating); did not notice any blood on them; Gillard was a strong man. Mr. Chaloner had the pistol in his hand, pointed at Gillard, was standing in front of Gillard, standing still. On recross examination witness

testified that at that time, while Chaloner was standing in front of Gillard, he was about eight or ten inches away; when he left the room, Mr. Chaloner was the distance he describes from Mr. Gillard, Mr. Money was in the dining room, and he doesn't remember just where; when he was leaving the dining-room Mr. Money had a hold of Gillard.

Thereupon, the plaintiff offered as a witness ERNLE GEORGE MONEY, who testified that he is employed by Mr. Chaloner at the Merry Mills, Albermarle County, as his agent, and has a small farm of his own, but his principal work is at the Merry Mills with Mr. Chaloner; has known the plaintiff for twenty-eight years, first meeting him at Castle Hill, in Albemarle County, Virginia, probably in 1882 or 1883; was in the habit of going over to Merry Mills except on Saturdays, Sundays and Tuesdays; was chief of Chaloner's office staff, looking after the office and tending to all the books, bookkeeping, copying of letters, disbursements, paying salaries and wages, and everything of that kind; is thoroughly familiar with Mr. Chaloner's life; first saw Gillard August 1908, and two or three times after that at intervals; on March 15, 1909, saw him in Chaloner's dining-room at Merry Mills; on March 15, 1909, he was in his office at the Merry Mills and about two o'clock witness went into Mr. Chaloner's room who was up and beginning to dress, Mr. Chaloner came into his room and gave him some letters to copy and was on his way downstairs to see Mrs. Gillard and the children who, he had been notified were already down there waiting for him.

Witness further describing the incident as follows:

"He turned to me. Then he started to go down stairs, and he got about half way down the stairs, and I heard shrieks and screaming of a woman and children, and the loud voice of a man in the dining room. I then realized that Gillard himself was in the dining room, whereas we had only supposed that Mrs. Gillard and the children were. I then rushed down stairs; Mr. Chaloner was calling for me. Mr. Chaloner entered the room ahead of me; I was a few seconds behind him; when I entered the room, I had to go around to the left of a screen—a large Japanese screen, about seven feet high and about twelve feet wide, and when I got around the screen, I saw the children between the north window and the table. I rushed past those children, and I saw Gillard with a pair of heavy tongs lifted over his head this way (illustrating). Mrs. Gillard was kneeling, with her hair all disheveled over her head, and bleeding; I noticed blood on the floor. Mr. Chaloner was on his knees, like this (illustrating). He had one hand on the top of his head, and his other hand he had reached out that way (illustrating). Mr. Gillard was about the same distance between the two parties; he could have struck either one or the other. I rushed in, grabbed the tongs, and twisted them out of Gillard's hands, and laid them on the pedestal in the corner of the room by the east window, that had a bust of Mirabeau on it. I then very quickly got behind Gillard

and put both my arms around him from behind, holding h arms down in that way (illustrating).

* * * * * * *

"I said, 'Now we have got you, Gillard; you are a wife beate He said, 'All right, Mr. Money; all right.' Then he and I beg scuffling; he was trying to get away from me, and I was holdi him, and we began gradually heading out way down toward t south window. Mr. Chaloner, in the meantime, had risen, a was standing some distance off. He had a little pistol in his han While I was scuffling with Gillard, Mr. Chaloner said—'Now, G lard, you keep quiet; we are not going to hurt you, but we a going to see that you do not hurt anyone yourself. I am going have you tied, and I am going to put you in a wagon and se you up to Charlottesville by some of my men, to be put in jail a sent to the penitentiary for beating your wife.' Then Gillard a I resumed our scuffling. We gradually edged our way past t window towards the small sideboard. When we got there Gilla pushed me up against the sideboard; I was behind him, and it w just a convenient height for me to sit on, and I held Gillard the for quite a little while, and Mr. Chaloner had the pistol in h hand pointing away from Gillard, toward the south window. Th little sideboard was beyond the south window, and Mr. Chalon had the pistol in two hands, pointing away from Gillar

16 After we had been by the sideboard for a few minutes, Gilla began to renew his efforts to get away from me edging towar the larger sideboard. Just about that time, I realized that Joh Grady was in the room. He came up from behind me, and grabbe Gillard by his two wrists, and held them down, that way (illustra ing), Mr. Chaloner still having the pistol in his hand, pointing t ward the window. Mr. Chaloner then said, 'John, you go and g some of the men on the place, and we will have Gillard tied an sent to Charlottesville.' John said, 'There aint no men on th place.' Then I said to John, 'You go and get the rope, John, and will hold him until you return.' John then left the room. A soon as John left the room, Gillard redoubled his efforts to g away from me. I saw an opportunity, and I threw Gillard on h back, on the floor. I got on the top of him then, on his chest an stomach—midway between his chest and stomach—holding dow his arms in that way (illustrating). We stayed there a short time I was waiting for John to return with the rope, when suddenly— cannot explain how—Gillard, by some tremendous effort, thre me off. I went up in the air, but I landed on my feet. As soo as I landed on my feet, Gillard was on his feet too, at the sam instant. I got behind him again, and got my arms behind hi like that (illustrating), and held him in the same position as did before. Gillard then said, 'Come on now; come along now come on,' and was trying to push me out through the door leadin from the dining room. Mr. Chaloner was between the door and M Gillard and myself. Gillard was edging away towards the doo and possibly getting the better of me, and all of a sudden I hear

the report of this pistol. Gillard had, in the meantime, been exerting himself considerably, with all his muscles, trying to get away from me. Immediately after the report of the pistol, I realized that Gillard had probably been struck, because his muscles relaxed from my arms. Holding him from behind, I turned around to look at his face, and I saw he was dying, so I laid him down on the floor. He never moved a muscle; never uttered a word; I never heard him even give a gasp for breath. As soon as I laid him down on the floor on his back, John returned with the rope," and saw Gillard lying on the floor and he at once dropped the rope on the floor by Gillard.

Witness further testified that Gillard was about thirty years of age, a very powerful man, and had the reputation of being such; that he was holding Gillard from behind and the left part of his head was pressed against the right side of Gillard's head; their heads were close together; during this scuffle Mr. Chaloner had the revolver.

On cross-examination witness testified that he had known Mr. Chaloner about 28 years, had been employed by him in Virginia for 25 years at least, was not in his employ anywhere else; that Mr. Chaloner bought the Merry Mills in 1894, having come to Virginia previous to that in 1893 or '92; that on March 15th, 1909, the first he saw of Mr. Chaloner was when the latter was arising about two o'clock in the afternoon, and he first heard that Mrs. Gillard
17 was there when he went into Chaloner's room, which was on the second floor where his office was located, as well as the guest room; when Chaloner left him he had on his slippers and a rugby foot-ball cap; he is pretty sure that when Chaloner left him to go down stairs, he did not have any books or papers with him, because he left everything he brought in with the witness; at that time did not see a revolver in Chaloner's hand. He remained in the room and did not follow him out; Mr. Chaloner had not reached the dining room when witness heard some noise; when he came to the stairs to go down after hearing the scream, Mr. Chaloner was just going into the dining room; after leaving his office that day Mr. Chaloner did not go anywhere else except right down the steps; the witness immediately followed him; when he reached the dining room door there were in the dining room Mr. Chaloner, Gillard, Mrs. Gillard, and about four or five children, the eldest being a boy of about fourteen and the youngest a baby in Mrs. Gillard's arms. The first thing he did was to wrench the tongs from Gillard's hands, and then pin him from behind. He put his arms around him, leaving Gillard's forearms loose; it was a few seconds after he had pinned Gillard and Mr. Chaloner got up on his feet that Mr. Chaloner produced a pistol; he had not drawn his pistol when witness entered the room; he was standing some distance off; the witness and Gillard went down towards the sideboard; witness and Gillard were on the south side of the room; Chaloner was on the same side; When witness first began tussling with Gillard, plaintiff was about eight or nine feet away. Mrs. Gillard had gotten up in the meantime and was on the north side of the

room, sitting in a chair, which was on the other side of the dining table; did not see Chaloner draw his pistol and does not know where he obtained it; about a minute after he tussled with Gillard, he saw Chaloner with pistol in his hand about eight or nine feet away; he never pointed the pistol at Gillard; never saw him point it; he was tussling with Gillard and was not paying special attention to Chaloner; did not see John Grady come into the room;

Grady came into the room a few seconds after Gillard was shot and was dead; in his opinion, his death was instantaneous; the bullet went into his head somewhere above the ear on the left side and lodged a little higher up on the other side; witness had his left cheek against Gillard's right cheek.

Thereupon the pistol in question was produced and witness identified the same as the pistol as was used on that occasion.

On re-cross-examination the witness testified that he had not seen that pistol often; he knew Mr. Chaloner had it because he had shown it to him; identified the pistol because it is rusty on one side and comparatively smooth on the other, and knew it was a Smith & Wesson .32; it had rust on one side that would come from proximity to a man's body.

On re-direct examination the witness testified that Mr. Chaloner stood very highly in their neighborhood ever since he had been living there, and that was true of his reputation for peace
18 and good order; he and Mr. Chaloner were vestrymen of the Grace Church, Albemarle County.

Thereupon the plaintiff, to further maintain the issues on his part joined, took the stand in his own behalf and testified that he has a legal residence at Roanoke Rapids, Halifax County, North Carolina, and a business one, where he spends the major portion of his time, at Merry Mills, Cobham, Albemarle County, Virginia. Being asked where he was educated, the witness testified as follows:

"At St. John's Military School, at Ossining, on the Hudson. I was there four years. I then went to Rugby in England for two years. I then returned to America, and prepared for Columbia University, with a tutor at Newport, Rhode Island, for one year. I entered Columbia and was there three years instead of four, doing the Sophomore year's work in the vacation of the Freshman year, I therefore got my degree in three years instead of four, which is the usual time. I graduated in 1883 with the degree of A. B. and in 1884 I took my degree of A. M. In 1885 I was admitted to the Bar of New York. I then traveled for five years abroad. Before traveling, I might say that I spent the summers of 1883 and 1884 in visiting every state and territory in this country west of the Mississippi—those two summers. I then went abroad in 1885 and traveled in Mexico, the West Indies, South America and Central America; then went to Europe traveling through Europe and Northern Africa. I then took up a residence—temporary, of course,—in Paris, France, where I lived for some five years. I then took up a course at the French Educational Institu-

tion—a post-graduate course—but did not try for a degree, at the Sorbonno, at the College de France, and the Ecole de Science Politique, or school for political science. I came back to this country and opened a law office—I returned in 1891—in New York, in the Equitable Building, at 120 Broadway, in the spring or early summer of 1892. I was head of the firm of Chanler, Maxwell and Philip, and this firm was in existence until 1896, when Maxwell withdrew, and it was Chanler & Philip until I was taken to Bloomingdale, in 1897, when the firm went out of existence. Mr. Philip continued to practice, but it was no longer Chanler and Philip.

The witness further testified that he was the author of a publication known as "Chaloner on Lunacy, or The Lunacy Law of the World," being an examination of the lunacy laws of forty-eight states and territories of the United States, and of those of Great Britain, France, Italy, Germany, Austria-Hungary and Russia. Has also written a book entitled "Four Years Behind the Bars of Bloomingdale, or The Bankruptcy of Law in New York." He is a blood relative of Ward McAllister. He has written several plays.

Witness about two years after his escape from Bloomingdale, was pronounced sane by a court in Albemarle County and acquitted by the court on November 6, 1901, after careful investigation of his sanity.

19 The witness further testified:

"I was elected a vestryman some two years afterwards. I served for a year or two, when I resigned, because I was unable to present myself at the business meetings of the vestry, which took place about ten o'clock, and keep awake, for the reason that I worked all night. I worked all night for nearly twenty years, never going to bed before three or four o'clock, the reason being that at Bloomingdale the lunatics made so much noise in the day time I could not do any reading or literary work, with which I kept myself occupied while at Bloomingdale, and therefore I turned night into day, and slept all through the day, working until four o'clock in the morning, and sleeping until two o'clock in the afternoon. The medical superintendent, Dr. Simond Lyon, was extremely kind to me in allowing me to do this. It was absolutely contrary to the rules, but he allowed me to do it. Therefore I got in the habit of working at night and never arising until two or three o'clock. I give this explanation to show why I could not attend the meeting at ten o'clock. Those four years at Bloomingdale caused this night work to become second nature to me. I am like a night watchman.

Witness pays one hundred dollars a year towards the support of Grace Church, and about twenty years ago insured the church for eleven thousand dollars and carried the insurance for ten or eleven years until the church burned and the church got the benefit of the insurance and was rebuilt.

"Plaintiff founded an endowed prize for art students consisting of a four year scholarship in art studies abroad. It had to be done by private subscription. He obtained a subscription from his grandaunt, Laura Astor Delano, from William Waldorf Astor, now Baron Waldorf, his uncle, William Astor, Cornelius Vanderbilt, and others,

He went to every art patron he knew, but found them to be very rare in New York—there being several by reputation but few in fact when it came to giving up money. He subscribed the balance himself, and carried out the plan. To the Presidents of the Academy of Design, the Society of American Artists, The Water Colors Society, The Art Students' League, and the National Museum of Art, witness submitted the plan, and they approved it.

The prize was won successively by Bryson Burroughs and Lawton Parker, each of whom was sent abroad, and the latter won the gold medal of 1913 of the Paris Salon, the highest honor ever awarded to an American in France, which had never before been awarded to a foreigner.

He was committed to Bloomingdale in 1897 and arrived in Virginia six weeks before September 20, 1901. The plaintiff has a proceeding pending before the Supreme Court of the United States to come up in June, 1917, an appeal from the Federal decisions in New York.

The witness further testified in reference to his first meeting with Gillard, as follows:

"As a result of this visit of Gillard I told him I would look into it. I did look into it, namely, his want, and whether he was in need, and acceded to his suggestion to bring his wife and small children over to see me in about a week at the Merry Mills, in the dining room, with himself. He then—I do not know why—came up to Cobham, where the Merry Mills are situated, and hired out to a gentleman in the neighborhood, an acquaintance of mine.

"A few days before the 15th of March Joseph W. Sampson, an old friend of mine, came over to my house and came into my room with Colonel Money. I am not going to mention what he said, but the result of his statement to me was this. I said to Sampson, "You go to Judge Dabney." He was then my lawyer. I said, 'You go to Honorable A. D. Dabney and tell him that I have sent you there, because Gillard is a wife-beater; that you live within a stone's throw, or a very short distance, of Gillard's house; that Mrs. Gillard came to your place about three weeks ago crying, and went in to see your wife and showed wounds, bloody wounds, on her back from a poker or other instrument, from a beating. That this happened three times. That you, Sampson, are a man who can not hear of a woman being beaten without desiring to stop it, and that you, Sampson, have come over to me as a lawyer, as a man known to want to help people in the community who were in trouble, to straighten things out as a lawyer should. So tell Judge Dabney this is my plan, that the next time that Gillard beats Mrs. Gillard she is to flee as soon as he leaves, on one of his fifteen or twenty mile jaunts in search of clocks or sewing-machines.' As soon as he left on his walk that would give Mrs. Gillard time. The question arose, where was Mrs. Gillard and her flock of children to go, five of them. They could not go to Sampson's, because there was no other building on the place fit for habitation but the house, which was small. They could not go to Colonel Money's on account of the same reason. They

could come to Merry Mills, because I have two other large houses on my place, one occupied by Edward Connock, the head farmer, and the other by his brother, Harry Connock, both white men, both married, and both with families, and there was ample room in both those houses to shelter Mrs. Gillard and her family. Judge Dabney was to O. K. this plan, or to improve on it. As a result of this plan Mrs. Gillard fled to the Merry Mills for protection.

"Now we come to the 15th of March. The 15th of March I was awakened by John Grady, whom you gentlemen saw the other day, at two o'clock, my usual time, and in consequence of what he said I dressed rapidly—trousers, coat, waistcoat and stockings and slippers—and ran downstairs, or started to go downstairs, and took up some papers there, some letters, on the way, and dropped into the office on the second floor, opposite the guest room, where Colonel Money works with the other gentleman of my office force. There was nobody else there then. I gave him these letters to copy, and as I was leaving the room, or just as I got to the head of the stairs, I heard a man's voice in a very low tone. I then made a remark, which I shall not repeat, to Money, and after making that remark—oh, yes, I can say what I said. I told him 'I believe Gillard is downstairs. He has come.' Then Money said something to me
21 which I shall not repeat, and then I said 'I will call you if necessary,' or words to that effect. I then started leisurely down the stairs, and as I had taken three of four steps, gone down three or four steps, I suddenly heard moans from a woman, and cries of children, and a crushing kind of sound, which I never heard before in my life, as an iron striking something soft. I rushed downstairs two steps at a time, holding on to the bannister so as not to fall and sprain my ankle, so as not to be of any use in any possible fracas, and just as I started to open the door out came young Gillard, a boy of fourteen, George Gillard, with a welt over his forehead, extending from his left eyebrow to the right, from the left temple. It ran from the left side of his forehead down to his right eye, made, evidently, by a heavy iron instrument. He said 'Father is beating mother,' or 'Gillard is beating mother.' He was crying. The tears were gushing from his eyes. There was no blood in his wound, but an enormous welt as big as my little finger, about. I said nothing, but dashed into the open door. He had left it open. I dashed around the Japanese screen, which extended in front of the door, dashed around the left of that and around a large mahogany table, and as I got in front of the fireplace there were two small children on the floor. The ages of the children—one was a baby in arms; that was not on the floor; but the two on the floor were about three or four; George Gillard, who ran out of the room, was fourteen. I jumped over these children, and I was enraged at this sight of what I saw. There was a wood-box, which is just like this (indicating); here is the fireplace, right where his Honor is sitting, and the chimney juts out just as this does here, a little further, and there is a wood-box here about six feet long, containing wood for the fireplace, and Mrs. Gillard was kneeling down just like this (indicating), with an infant in her arms, shelter-

ing the infant, against this wood-box, and Gillard was raining blows. I did not see him rain any blows, for he did not hit any blows after I got in, but I saw Mrs. Gillard, and the condition she was in. He was standing back of her with the heavy tongs raised, and she was sheltering the child like that (indicating), leaning over the box. I leaped over the children, and I said 'Wife beater*m*, and rushed at hom. His back was here (indicating). He was so absorbed in beating Mrs. Gillard and raised the heavy tongs, which weighed pounds. They were iron tongs, old-fashioned Colonial tongs, about hundred years old, about as thick, the tines were, as my little finger. They are on exhibit in another case, or else they would be here. They were heavy iron tongs as long as that (indicating), about three feet from the floor, with a heavy brass handle. They were tremendously heavy. They were as heavy as a heavy iron poker. Gillard had this instrument raised like that (indicating). I dashed around the corner here, and there was space between here and there. In that corner, where that gentleman is sitting (indicating) was a bust of Mirabeau, the French artist, a bust about that high (indicating), and it was on that bust that Money laid the tongs. There was plenty of room between me and that bust for me to get behind Gillard. I rushed behind him and caught him by the scruff
22 of the neck and tore him away from his wife and pinned him against the wall right there, and took him by the throat with my left hand, and then held him with my right just against the wall like that (indicating), he having the tongs raised aloft like that (indicating), but up against the wall, if it was the wall there (indicating), right up against the wall. I had on my head a cap, a heavy velvet football cap, very heavy, with a knob made of silver *wore* on the top as large as that (indicating). It was made in England, and the cap is here if it can be accepted. This is exactly identical to that cap. The original is on file, but this is the one. I sent to Rugby and got it. That is why I was not stunned and did not have my scalp cut all to pieces by this pair of tongs, because I had this heavy velvet cap, which acted exactly like a helmet, on my head, and on top was this knob. Gillard then, as I pinned him against the wall, raised the tongs. He had the tongs raised—can that cap go in, your Honor? This is not a cap I invented. It is a Rugby football cap. I was a fullback, and I sent for it as a souvenir. I had this cap on my head like that (indicating), he struck this knob, and that is what saved my life. He would have fractured my skull. I was close up against the wall, and I had my hand against his throat. It was just like a football rush between Gillard and me. I was attempting to pin him against the wall like that, and he was attempting to get away. I knew if I kept him close to the wall he could not hit me well with these tongs, and I kept him jammed up against it. I had slippers on. They were smooth as dancing pumps, and they slipped over the wax floor. There was a large table in the middle of the room and a rug, and at the edge of the rug was a space of four or five feet of waxed wooden floor, and on that I slid as though I were dancing, and Gillard had on heavy shoes, and they gave him a hold, so he pushed me away,

But before he got me far he struck me on top of that knob, and I went down to my knee. I was a little bit dazed, but hardly dazed. It was a heavy blow, but I arose almost instantly and prepared to charge at him again. Meanwhile, Gillard, having knocked me down—I had fallen backwards somewhat, retreated and fallen backwards to my knee—Gillard came away so that he could strike with the tongs and give me a full arm blow, and knock me down and stun me. I had on these slippers. They slipped so in the first encounter that I was going to take a chance and see if stocking feet would be any better. So I slipped my slippers off and charged him in my stocking feet. I found they were worse. They slipped more than the slippers did. As I charged right at Gillard, just as I got in striking distance he gave a splendidly aimed blow right on top of my head, and he pole-axed me just like I was an ox, and he knocked me completely out. I did not stay down long. I was about two seconds. I certainly did not take the count. I got up before I was knocked out, and just as I was getting up I heard a rushing sound and that Colonel Money. I had called out 'Colonel' just as I was going downstairs. I am not certain whether it was when I was going down or when I was entering the room. I may have done it when I saw young Gillard coming out with the
23 wound. I then watched what took place, which was as follows. I could see this. I was unconscious when Gillard was standing between me and Mrs. Gillard. As I believe Colonel Money has testified, he was standing, when he first came in, midway between Mrs. Gillard and myself. I was unconscious when he was standing there. He had decided I was either dead or hors de combat, was a negligible quantity, and turned his attention to Mrs. Gillard, and was goinga to beat her up or kill her, whatever his intention was, was going to give her some more beating. So he had raised his tongs and was about to deliver what would have been a knockout blow, for the reason that her hair—she had tremendously long hair. It went away below her waist, black hair, and what saved her life was that she wore her hair, as many English women do, tied up in a plait about as thick, hardly thicker than the middle finger and wound around and around and placed right on top of the head, making a mat such as women place flat irons on, to keep them from burning clothes, a perfect mat. This mat had been destroyed by the blows from the tongs in Gillard's hands. That is why she was not killed, and this tremendous suit of hair was what saved her life, for when I came down her hair was streaming all over her face, and Gillard was about to deliver the knockout blow, because there was no more hair on her head to protect her, when Colonel Money, with extreme dexterity and generalship, twisted the tongs out of Gillard's right hand, and with tremendous speed turned and laid them on the bust of Mirabeau and then caught Gillard from behind, pinning his arms to his sides, and caught his forearms, leaving them free. I then kept away, and a tremendous struggle ensued between Money and Gillard, Gillard trying to release his arms, and I could see his arms going that way all the time (indicating) convulsively moving, trying to get away from Money. Money was holding them just as

though they were in irons. Money was hugging him with his head on Gillard's shoulder, cheek by jowl with Gillard. They whirled there like two expert wrestlers for some seconds. Mrs. Gillard arose and carried her baby away to the other end of the room, and took a seat at the end of the table. It was a mahogany table, facing due south. The room faces north and south, almost exactly. She sat at the north side of the table, and on her right was her son George, who picked up one of these recumbent infants I have spoken of and was holding him. I do not remember where the third and fourth children were. One of them went upstairs, the oldest one, named Mona, a little girl about nine, went upstairs, and, as John testified, went off in the office and said something, so she was out of the room. Also I do not remember where the second of the small children there on the floor went. I do not remember that. I was too much occupied with other things at the time. But I did recognize and check off the fact that Mrs. Gillard was sitting there safely with the child in her arms, and George was on her right. Now, gentlemen of the jury, the screen was running right along, like as if here was the door, where his Honor sits; here was the Japanese screen, about seven feet high and twenty feet long, running the full length of the mahogany table. George was sitting here, and Mrs. Gillard there (indicating). Money was whirling with Gillard. Money then whirled
24 around to the right somewhat and was sitting against the small sideboard, which was between the window and the Sheraton sideboard, which ran almost the entire length from the south side of the wall to the door. Money was sitting there when John Grady stole in noiselessly and seized Gillard from behind, that is, seized his wrists and held them, as Gillard was evidently making a motion towards his hip pocket. It developed he had no weapon there, but he had something of an iron nature, an implement of iron. I could not swear what it was. It was something like a wrench or something of the sort, about four inches long, of iron, and evidently it was what he was going to get, but it was not a pistol and it was not a knife. We went through his pockets after the tragedy. I said 'That's right, John, you hold him.' Then, when they were in that position, I for the first time drew my pistol out of my hind hip pocket. This pistol was a self-cocking, 32, Smith & Wesson, which I had got in Philadelphia. I had this pistol all the time. I had this pistol since Thanksgiving, 1900, and my habit was to put this pistol in my pocket when at the Merry Mills in the house. I did not carry it out doors, but in the house, for the reason, that the house is very lonely. There are woods, and it is quarter mile from any neighbor. I have only one servant, a colored man, and he was liable to go out with me when I went out, or go away on messages, and the house was left absolutely deserted. There was only one servant in it, and he was liable to go out with me, so I, being a rich man, and being more or less in the newspapers, knew that a burglar could find out about my place and look it up and break in on me and hide behind a door as I came in and hold me up and maybe do me up, beat me up. So I did not want to take that chance, and I always carried this in the house.

"I took this revolver out, and as I took it out they were over there, by the bench there (indicating). Money was sitting on a small sideboard with Gillard in his lap, so to speak, and John Grady behind holding Gillard's wrists from behind. I took this out, and the window was directly due south there. I took it out and held it in two hands and pointed out towards the window, and the reason was that when I talk I make gestures, and I was very much afraid that inadvertently I might point the pistol, in making a gesture like that, at Gillard, and that would mean pointing it at my friend, Colonel Money, because his face was right beside Gillard's, and Gillard was a double-headed man at that time, and John Grady looming up in the distance behind. So I had every reason in the world to keep this self-cocking revolver pointed from this man. Besides, I am afraid of firearms, in taking chances. So I anchored the pistol with my left hand so I could not, no matter how unsteady I was, make a gesture and discharge it. That is why I took hold of the barrel, and as John said, carefully took hold of it. It was pointed due south. I then said words to this effect: 'You are a wife beater, but we are not going to hurt you, and I am going to see that you do not hurt anybody else, Gillard. I am going to tie you up and put you in a four mule farm wagon, covered up with straw so it will be plenty warm, and drive you fourteen miles to Charlottesville and turn you over to the sheriff, who will present you to the grand jury, who, unless I am very much mistaken, will send you to the penitentiary at Richmond for a term of years at hard labor for being a wife beater.' Gillard said nothing. That was all I had to say. Then I said, following out this train of thought which I have just given you gentlemen of the jury, about carrying him up in the wagon, 'John, get the man.' John said 'The men done gone, sir. No men on the place.' They had gone off to spend a few hours with the miller of the Merry Mills, which is a grist mill on our place a quarter of a mile from the place, both of them, Harry Connock and his wife and Edward Connock and his wife. That is why Mrs. Gillard could not get entrance into their house when she ca-e and wanted to, as John has shown. As soon as he said he could not get the men—I differ with Colonel Money here—I am under the impression that I said 'Get a rope.' I may be wrong, but I am under the impression that I said 'Go get a rope,' not 'the rope.' He knew where the only rope in the house was, that was a rope long enough, almost, to reach from here to the end of this court-room. We had a clothes-line in the guest chamber. I have no guests at Merry Mills. The only guests are lawyers who come on from New York and spend the night once in six months, and therefore the guest room is only used to keep my trousers and clothes in, and it was tied in three places, over at that corner and that corner and here (indicating). There depended from it some coats and about twenty pairs of trousers. He knew I was careful about my clothes, so he did not undo it any way, carelessly, but laid the clothes on the bed carefully, did not want to take the crease out of the trousers. That took him some time, about ten minutes, I should think. He came downstairs

with the rope. Before he came with the rope, this transpired. A soon as John left, Gillard had been resting. Mr. Money could no rest at all. He was holding Gillard. Gillard was resting, and al of a sudden, as soon as John left he showed great generalship. H pushed Money off of the small sideboard and a struggle began, an Money was more than a match for him and instantly threw Gillar and sat on him, on his chest, with his knees on his arms, so that h could not raise his hands, and not a word was said during this time All of a sudden Gillard gave the greatest feat of strength I hav ever seen, on the stage or off the stage. He arose without puttin his hands down. He rose up like that (indicating) with such forc that he hurled Money from him, and Money went up in the air an came down standing. Before Gillard could get at Money, Money quick as a cat, turned and caught Gillard from behind again. Gil lard had very big teeth, and Money would have risked having hi nose bitten off if he caught him as catch as catch can. So he caugh him from behind, and he took his hold on his arm. Gillard showe the effect of the rest on him, because he felt that Money's strengt was beginning to wane, because Money had been fighting for abou fifteen minutes or so, holding Gillard, and Gillard's arms in tha struggle moved like that (indicating). Gillard then said, 'Coo along here, noo; coom along here, noo,' using a very broad accent

Then he began to pull Money toward the big Sheraton side
26 board about here (indicating) and he dragged Money. Be
fore that Money had been able to control his motions, bu Money was beginning to tire, because he had been fighting inces santly for fifteen minutes, and Gillard had been resting off and on So, when he got there, Gillard was gradually working down slowly inch by inch, one or two inches at a time, down the narrow passage way of about 18 inches or two feet between the Sheraton sideboard and the Japanese screen, a very small space there. He was makin toward that space; he had not reached it. He was still against th sideboard. But in my interest I was afraid if he came there h would thrust his hand through the screen and choke George or th child in George's arms to death. I was very much concerned, see ing how things were going, and in my interest, endeavoring not t take risks, I stepped too near Gillard. He was an extremely foxy proposition, and he had kept his forearms straight to his sides when he was struggling. I do not say he never raised them, but he cer tainly did not have them raised when I drew my pistol, and was standing with the pistol pointed downward. After I had shown the three men that there was no danger from the pistol, I took my right hand off it and held it pointing straight to the ground. I was very careful, gentlemen of the jury, and I pointed it, because it was a self cocker, and I had only slippers on, and if it went off I would lose a foot, because it pointed down straight at the floor. My in terest got the better of me, and I inadvertently walked towards Gil lard. He was watching me, I found out afterwards from his actions, and suddenly seized my hand like that (indicating) with his left hand and swung the pistol right like that, and his forearm was there, you understand (indicating), swung it like that so that it

pointed straight at his wife and little baby, an infant in arms. Of course, I was horrified, and had unusual strength. The fearful responsibilitiy gave me strength, and I swung it straight back instantly, but before I did, he began fingering the butt with his thumb in order to get the pistol out of my hand and explode it. I strengthened my hold on the pistol. Of course, you cannot hold it firmly without a finger on the pistol, and I had a hold on the trigger, but of course the hammer went down. He tried to root the pistol out of my right hand with his thumb, and I strengthened my grip on the pistol, and he found he could not do that. He was doing this after he had swung my hand down towards his wife. With almost supernatural force, the force that comes to all of us in supreme moments when a woman's life and a baby's life are in danger, I swung it back like that (indicating), but I did not swing it at Gillard's head; I swung it right past, and then a duel took place, a wrist duel, between Gillard and myself, for the possession of the pistol and what was to be done with the pistol. As I swung it by his head, it was pointing straight ahead. Money's head was right here (indicating) alongside of Gillard's. Gillard then took hold of the pistol, and among the last things I remember—there was not a sound uttered—the last thing I remember is seeing his fingers come down on the barrel like a tarantula. I have killed tarantulas in Arizona,
27 and it moved just like that. It made an impression on me. After that he took my hand and began to squeeze it. That is all I know. The first thing I knew the pistol went off and Gillard sprang into the air and came down a dead man, and as soon as that was done, as soon as he came down, he jumped out of Colonel Money's arms and came down, Money still holding on to him, Money then looked at him and laid him out on the ground, and just at that time, when he was laid out, John Grady, who had been away about ten minutes, returned with the rope in his hands, and when he saw Gillard lying there he was, of course, shocked, and he dropped the rope."

Witness further testified that he is not sure, but thinks that after the shooting, he put the revolver in his pocket; he wanted to be sure that it was to be got at for the Coroner's inquest, and he said that nothing was to be moved in the room; when Gillard fell the revolver was still in his hand, and he afterward put it in his pocket. The witness said:

"I then had a chance to look at Mrs. Gillard and the room. There were blood spots on the floor by the wood-box where the beating had taken place. There were hair pins all over that portion of the room. You understand, gentlemen of the jury, this was a waxed floor. You could see the blood on it. Hair pins were scattered about. The tongs were so beaten that they were twined like a grapevine, and they became one solid bar, and they were so twined together that it took a blacksmith to open them. They were a solid bar, from the force with which he beat his wife. The tongs were covered with blood, and had blood streaming from them, and had hair sticking to them. Her hands with which she protected the baby were black and blue, because sometimes the tongs would go over her head and

reach over her head and hit her hands, and the outsides of her hands were black and blue. She held the baby close to her chest and protected the child. There was no mark on Mrs. Gillard anywhere except the ones on her head and the blood on the floor and the hand."

After the occurrence in March, 1909, the story of what happened, about this occurrence, appeared on the 17th of March in the newspapers; saw the clippings of the accounts in that connection by Washington papers; subscribed to two or three press clipping bureaus and received them in the shape of clippings; saw the account carried in the Washington Post of the 17th of March; either then or later.

Thereupon the witness was shown a diagram marked "A." Whereupon the following offer of proof was made by counsel for defendant:

"Mr. Lambert: I propose to ask this witness now—but if it is to be excluded, I do not want to get it before the jury—with reference to his conduct around the neighborhood in which he lives, relative to escapades and episodes of shooting up automobilists and automobile travelers, and getting notorious in the papers in that connection, something like a year ago, as bearing on this questio*j* of reputation for peace and good order down there."

28 To which offer objection was made, which objection was sustained, to which action of the Court in sustaining said objection counsel for the defendant then and there excepted, which exception was then and there entered upon the minutes of the Court.

"Plaintiff was further cross-examined by counsel for defendant, and testified:

That the first knowledge he had that Mrs. Gillard was in his house was when John Grady told him so when he woke him; that he said nothing at that time about Mr. Gillard being there, Gillard not having arrived then. When he started down stairs he did not expect to find anybody down there except Mrs. Gillard and the children, and was perfectly surprised when, as he started downstairs, he heard Gillard's voice, and so he stepped back and spoke to Colonel Money. He then descended the steps in a leisurely manner, because Gillard's voice was very soft; he had an extremely soft voice, a very soft voice, and the voice plaintiff heard was extremely soft; after he had taken some six or eight steps down stairs he heard all of a sudden, an out-burst of moans on the part of Mrs. Gillard, and the shrieks of the children, and this crushing sound, which was the tongs striking on her head, and he then rushed down the steps as fast as he could. While the plaintiff was in the dining room, before Colonel Money came down stairs and came into the dining room, the following things took place:

There were four fights, four combats took place during that time; the first was plaintiff seizing Gillard and dragging him off his wife; the second was plaintiff pinning him against the wall; the third was Gillard attacking plaintiff with the tongs and knocking him down; and the fourth was plaintiff catching him by the throat. At the

end of that time Gillard knocked plaintiff down and knocked him out for two or three seconds. Plaintiff did not draw the pistol until after Mr. Money came down into the room and until after plaintiff had been knocked down twice and Money had Gillard dead to rights, had him disarmed and a half Nelson, so to speak, around his arms—his forearms were free—and plaintiff was a mere spectator. At all times after Money came in, plaintiff was about four or five feet away from Gillard, until, inadvertently, in his anxiety lest Gillard should thrust his hand through the screen and kill the children, plaintiff unconsciously stepped within his four foot limit that he had set to keep away from him, and then Gillard slipped out his hand and seized the butt of the pistol and shoved plaintiff's hand up towards his wife, as plaintiff has described. Money had this half Nelson upon the upper part of Gillard's arms, so the only thing that was available for Gillard to use was his forearms. Gillard was dragging Money slowly past the sideboard and plaintiff, in his anxiety, stepped down near to them and he had the revolver in his right hand, and the first thing he knew Gillard had hold of his hand and had the revolver leveled straight at Mrs. Gillard. John Grady was mistaken in stating that at the time he left the room plaintiff was standing about eighteen inches away from Gillard with the pistol pointing at him. He could not point the pistol at Gillard without wanting to kill him, and if he did he would have killed Money too. It was a mistake upon the part of the
29 negro. At the time John left the room the cheek of Money and the cheek of Gillard were together. Money's cheek was always cheek to cheek with Gillard. He rested his head on Gillard's shoulder side by side, the whole time. There were two different propositions as to the manner of plaintiff's holding the pistol. One was when he was demonstrating to Gillard why he had the pistol in his hand, and that time he had his finger off the trigger entirely, and held it in his left hand. Another reason why he had it in his left hand was to keep him from gesticulating to the right. He had his finger of his right hand off the guard, outside the guard, straight, so that Gillard could see it. He had no intention of using the pistol. He wanted Gillard to stop. He knew he was a man of gigantic strength. He could carry enough railroad ties to cover the work of two men, and he did not know whether Money could account for him and was confident that Gillard would kill every man in the room, if he made away with Money he would make away with the plaintiff. He wanted to overawe Gillard, wanted him to cease his struggle, and to see that he had a gun, and that he, Gillard, even if he overcame Money, would be held up by plaintiff with the gun. Gillard did not know there was a gun in the house, and if he did Money up, and got hold of the tongs he would get plaintiff. This was all to overawe him, let him know he was up against a gun, and discourage him. Plaintiff did not draw his pistol when he was fighting with Gillard because he felt capable of taking care of himself and did not want a pistol to take care of himself only in extreme circumstances.

Witness further testified that there was no other firearms in the

room, and he did not put a finger on the trigger until after he made the demonstration; he wanted to overawe Gillard; did not draw his pistol when he was fighting Gillard, because he felt capable of taking care of himself and did not need a pistol, only in extraordinary circumstances; thought he was man enough to get away with it when Gillard was knocking him down; that meant nothing to him.

Witness further testified on cross-examination that he was in no fear or terror of Gillard, nor did he feel that he needed any firearm for him; that after he had finished the demonstration to Gillard (at which time he had his finger off the trigger) he took a position of rest and began giving orders to send Gillard to Charlottesville to the sheriff; he needed rest himself and took a position of ease; when he took this position he pointed the pistol to the floor; when Gillard changed the position of the pistol that was his funeral; the witness did not change the position of the pistol from the floor to Gillard; Gillard did that; Gillard pointed it towards his wife and witness continued to hold onto the pistol; the hold he had on the pistol remained substantially the same.

This is the substance of all the testimony offered on behalf of the plaintiff.

Thereupon the defendant, to maintain the issues on its part joined, produced as a witness WILLIAM P. SPURGEON, who testified that in 1909 he was managing editor for the Washington Post and had been thus for three years; had been connected with the
30 Post since 1893 or 1894, and remembers the occasion in March, 1909, of receiving a story of a tragedy in Mr. Chaloner's house in Virginia; the article in the edition of the Washington Post of April 3, 1909, entitled "John A. Chaloner Ill," etc., came from one of the Post's regular correspondent-; it is dated Richmond, of course his recollection would not go back to this exact article, but it came from a regular correspondent of the Post in Richmond, apparently.

Witness could not be certain about the method by which it reached him, as the matter would come by mail or telegraph, but he should say that was probably a telegram, although it may have been mailed; it came in the ordinary course of business from his regular correspondent in that section of the country, and it could not have gotten in the paper any other way than that, but he has no recollection about it. A "follow" story is any story that bears some relation to a story which has been published before, and this story is of that character.

"The following then occurred:

By Mr. Lambert:

Q. Coming to what I asked you about the occurrence itself, the tragedy, I will show you an article of March 17, 1909, printed by the Post in reference to this occurrence, and ask you whether you recall that story, and the channels through which it was received (handing witness paper)? A. Yes, I did.

The following occurred at the bench out of the hearing of the jury:

Mr. Lambert: I offer this article as bearing on two issues, among others in the case. One is want of malice, and the other is directly on any question of mitigation of damages. I want to show that the Post published an occurrence just exactly as the other papers did, and that the article is substantially correct and sets forth in substance the details of the way the tragedy was supposed to have occurred, and that that is bearing on those two issues principally. Further, that it affects the question of the good faith of the Post in using the language in the second story in reference to the killing of Gillard, or the shooting of Gillard, by John Chaloner. The article offered reads as follows:

31 "Shot to Death in Chanler's Home.

"Wife Beater Killed in Fight with New Yorker.

"Law Quickly Exonerates.

"Wife of John Gillard Flees to Merry Mills for Refuge.

"Tragedy Speedy Result.

"John Armstrong Chanler and Friend Rush to Rescue as Woman is Being Brutally Beaten with Pair of Tongs. Her Assailant Killed in Struggle for Pistol—Ill-treated Woman Weeps with Joy and Embraces Men Who Save Her Life—Evidence that Englishman was Trying to Aim Weapon at His Cruelly Injured Wife When Shot—Inquest Held on Scene.

"Special to the Washington Post.

"Charlottesville, Va., Mar. 16.—His mind unsound, in New York, yet sound in Virginia, aflame over the ill treatment of a woman in his house, his chivalrous, impetuous soul stirred to its utmost, John Armstrong Chanler (who had his name legally changed to Chaloner), brother of Lewis Stuyvesant Chanler, the former lieutenant governor of New York, rushed to the assistance of the weaker sex yesterday afternoon, and in a trice the man whose actions had aroused him lay dead.

"While grappling with Chanler, John Gillard, an Englishman who had frequently been the recipient of charity at the hands of Chanler, received a pistol ball in his right temple, which resulted in death a few moments later.

"This afternoon a coroner's jury held an inquest over Gillard's body in the room wherein he met his death a few moments after maltreating his wife. Chanler was exonerated of blame, but the whole of Albemarle County, which has had its eyes focused on him and his magnificent country place, Merry Mills, is agog over the tragedy.

"No Word of Censure.

"At the inquest no word of censure was voiced against Chanler. Gillard met his death in sight of his wife, whose countenance was marred by bloody wounds he had inflicted; his 14-year old son, and several other witnesses. One and all agreed that Chanler did not shoot him. Rather than this, the witness ventured the statement that Gillard was in the act of aiming Chanler's revolver at Mrs. Gillard, his weeping and bleeding spouse, when the fatal shot penetrated his brain.

"Gillard, who was the father of four children, met with financial reverses in Australia and came to Virginia about two years ago. After a short time in Richmond, he and his wife and children moved to the neighborhood of Cobham, and thence to Campbells.
32 The last-named place is about 2 miles from Chanler's beautiful home, Merry Mills.

"Aided by Chanler.

"Because he seemed to be a worthy and deserving man, upon whom fortune had continued to frown, Gillard was accorded assistance by Mr. Chanler on many occasions. Mrs. Gillard, a woman of comeliness and refinement, received many charitable attentions at Merry Mills.

"Yesterday afternoon, while Ernest Money was with Mr. Chanler in the latter's room in the Merry Mills mansion, Mrs. Gillard and her four children were announced by the butler. Being engaged in business with Mr. Money, Mr. Chanler remained upstairs some time after his visitors arrived.

"Meanwhile Gillard, who had followed his wife to Merry Mills, entered the Chanler parlor unannounced. A violent scene ensued. Gillard, who is said to have brutally mistreated his wife earlier in the day, cursed and abused her for coming to Mr. Chanler with her story.

"Believing she was in the home of a friend, on whom she could depend for protection, Mrs. Gillard became defiant, and is said to have declared to her husband that she would not only leave him, but would also prosecute him for ill treatment. This statement further enraged the husband.

"Brass Tongs as Weapon.

"Seizing a pair of century-old brass tongs placed at the colonial fireplace, Gillard rushed at his wife and rained blows upon her head, beating her to the floor, where she lay, covered with her own blood, screaming for mercy and assistance. Tugging frantically at the arms of his father, stood Gillard's eldest son, who is 14 years old.

"Aroused by the shrieks of the woman, Chanley and Money hurried downstairs. Chanler snatched a revolver from a chiffonier drawer before starting down to ascertain the cause of the screams.

"At the head of the stairs Chanler saw the enraged Englishman,

his own clothes saturated with blood, dragging his helpless wife across the floor by the hair, and belaboring her with the tongs, to which clung tufts of the woman's hair.

"Go to Woman's Aid.

"Fired at the sight which met his gaze, Chanler dashed toward the infuriated husband and helpless wife, commanding the former to release the woman. Chanler and Money seized Gillard by the throat at the same instant, and forced him to release the woman, who fell motionless to the floor.

"Gillard was a powerful man. The combined strength of
33 Chanler, Money and two negro servants was required to force him from the woman and wrest the heavy tell-tale tongs from his vise-like grasp.

"The frenzied man having been gotten under temporary control, Chanler despatched a servant to an outhouse to procure a rope with which to bind Gillard.

"Breathing with labored breath, and suffering from the struggle against odds, Gillard remained quiet a few moments, while his wife trembled and wept on the floor near his feet. Chanler, believing Gillard had been thoroughly subdued, instructed Money to sit on the Englishman's chest while he (Chanler) aimed a revolver at him to intimidate him.

"With almost superhuman strength, and in the twinkling of an eye, Gillard hurled Money from him, and madly dashed toward Mr. Chanler.

"Struggle for Gun.

"Seizing the revolver, Gillard, whose strength was treble that of Chanler, began to struggle desperately for possession of the weapon. Money, who had gathered himself from the floor in an instant, rushed toward the two struggling men, and engaged in the battle for the revolver. Wrapping his sinewy fingers around the muzzle of the revolver Gillard pointed the barrel toward his prostrate wife. Chanler and Money jerked the revolver upward at the same instant. A shot rang out, and Gillard reeled to the floor with a gaping wound in his right temple.

"Strange as it may seem, Mrs. Gillard wept with joy, and her face was wreathed in smiles of relief, while her husband lay on the floor gasping for his last breath. When the supreme struggle was over, the woman embraced her rescuers, whom she declares saved her from certain death at the hands of her husband.

"Quintus L. Williams, the local magistrate and coroner, was summoned to Merry Mills immediately after Mr. Chanler and Mr. Money were satisfied Gillard was beyond human aid. This section was stirred by the report that Chanler had murdered Gillard, and within a few moments several hundred persons surrounded the house.

"Jury is Summoned.

"Coroner Williams hurriedly summoned a jury to investigate the circumstances surrounding the death of the Englishman. The inquest was held over the body in the room where the struggle occurred. There lay the body of the slain man. The carpet was stained with the blood of his wife. Her fresh, open wounds were viewed by the jury, and the revolver with which the shooting was done was introduced as evidence.

"Tearfully and hysterically, Mrs. Gillard told her story of abuse, and collapsed as she led up to the time Mr. Chanler and Mr. Money entered the room where, she declared, she was being beaten to death. The woman said she had come to Merry Mills to complain of her husband's brutality, and that Gillard became infuriated at her.

34 "'Mr. Chanler and Mr. Money came into the room just in time to prevent my husband from braining me,' declared the woman. 'After my husband had been quieted, Mr. Chanler sent for a rope, with which to tie him, and turn him over to the constable. John became angered at this, sprang toward Mr. Chanler, and began a struggle for the revolver. In the scuffle the revolver was discharged. John was aiming the weapon at me when it exploded. He was struck by the bullet, instead of me, and fell to the floor.'

Did Not Intend to Fire.

"Mrs. Gillard's eldest son corroborated her story, as did two servants, and Mr. Money and Mr. Chanler. The latter declared he had no intention of firing on Gillard, but merely held the revolver aimed at him to intimidate him. The son said he was positive his father was determined to kill his mother, adding that on Saturday and Sunday Mrs. Gillard had been horribly beaten by her husband.

"After hearing all the testimony, the jury returned a verdict that 'John Gillard came to his death by the accidental discharge of a revolver in the hands of himself and John Armstrong Chanler, during which Chanler was in good faith attempting to keep Gillard from shooting his wife.'

"After the inquest Gillard's body was removed to Campbell's station, his late home. Funeral services will be held there today."

The following then occurred in the hearing of the jury:

The witness SPURGEON testified that the first information he received of what took place at Mr. Chaloner's house on March 15, or 16, 1909, involving this tragedy, was in the form of a telegraphic dispatch from Charlottesville by the Post's regular correspondent there, whose name he thinks was Hawkins, and that was the account published. He thinks the account came through the telegraph office located in the Washington Post building; came in typewriting. He guesses it would be pretty hard to trace that typewriting now. Such copy as that is only preserved for about a month. The article of March 17, 1909, came substantially as it is printed.

The Court: That (referring to the article of March 17th, 1909) contains a great many things besides what happened there in that room. I cannot let that in without seriously prejudicing the plaintiff.

Mr. Lambert: I just want the things that happened there.

The Court: How are we to get them?

Mr. Lambert: Pick them out.

The Court: Let the jury pick them out. That is not a cold, clear statement of facts.

Mr. Lambert: I want to offer such portions as refer to the way they treated what took place in the room with reference to the statements that the shooting occurred in connection with this scuffle.

35 The Court: The statement of the shooting is the one in the article in question. We are not involved here in an attempt to justify another article which is not being sued upon. The statement here is that he shot and killed this man while he was abusing his wife. That is the statement of fact, and the question is what information he had to base that on. If he had charge of this article, it may be proper for him to state. I suppose there would probably be no objection to that.

Subsequently, after the witness had been examined on another matter, the following occurred:

Mr. Lambert: I do not know whether I noted an exception to the rejection of the offer I made at the bench?

The Court: An exception may be noted.

"The witness was asked concerning the article of April 3, 1909, which is the subject-matter of this litigation, to state upon what facts, what information, he based the statements made in that article, and whether he decided about that article going into the paper. He replied, "I remember distinctly that we had a conference on the first story." He was told to confine his attention to the article of April 3, 1909, and answered: "The second one I have no direct recollection of." Witness testified with reference to the article of April 3, sued on, that he would be the last authority on a question of deciding whether such a dispatch should go into the defendant's paper, if it came up, and part of his duty was to look the proofs over of stories that had been put in type. Witness was responsible to the Post for this article in question, for this dispatch in question. The statement of fact in the article (of April 3, 1909) as to the way the killing occurred there, was, as witness understood it to be, in good faith, and that was the previous information he had received. Witness personally, and as a representative of the defendant, had no interest in any way, shape or form in Mr. Chaloner; had never known him or seen him before; and so far as witness knows the defendant paper did not in any way have any feeling of malice toward Mr. Chaloner, none that witness ever heard of.

On cross examination the witness testified that he remembers having a conference regarding one or another of the articles mentioned in Mr. Lambert's questions, which was the one referring to the night

when the first dispatch was received; does not recall any such conference prior to the printing of the article of April 3 regarding that article; could not go quite so far as that, because he does not recall the latter article directly at all, but from reading it he does not see any reason why there should have been a conference. Witness distinctly recollects the first story to which that referred; had in mind Mr. Chaloner and his place of residence and his general reputation when he allowed the article of April 3, 1909, to pass his desk. Witness says that as a newspaper man he knew of Mr. Chaloner for a number of years prior to that time; knew of his social position, wealth, general surroundings and history, and knew that he
36 had been adjudged insane and confined at Bloomingdale, but does not know that he was confined as a dangerous lunatic, nor that he was confined as a lunatic having homicidal tendencies; knew that Chaloner had established himself in Virginia and had property there, and had been declared sane there; also knew the story of his escape from Bloomingdale.

Witness received this article through the special correspondence channel from Charlottesville; did not take any steps to verify the article before printing it, except that "we have" reliable correspondents; it was necessary that the article should actually pass over his desk, being a special correspondence article, before it should be printed.

Thereupon the defendant offered in evidence an article appearing in the Washington Times of date March 17, 1909, giving an account of the shooting, the same being illustrated with pictures of the Merry Mills and rooms therein and portrait of the plaintiff. Counsel for defendant offered the article on the ground of mitigation of damages and on the ground of want of malice on the part of the defendant, especially on the mitigation of damages feature of the case, if that should enter into it at all, because he proposed by that to show that in other publications, or at least in this one publication, the language had been used to this effect preceding the one complained of, and it would necessarily affect any question of quantum of damages in the case.

The article offered is as follows:

"Virginians Glad Chanler is Freed.

"Jury Verdict Exonerating Him in Gillard Killing Generally Approved.

"Charlottesville, Va., March 17.—Virginians in this section today are relieved that the jury empaneled by Coroner Williams has exonerated John Armstrong Chanler (Chaloner), who yesterday shot to death John Gillard, wife-beater and soldier of fortune.

"The entire community is practically unanimous that Chanler, the brother of Lewis Stuyvesant Chanler and the man who has fought for years to have himself declared sane in the New York courts, did only what any red-blooded man would do in trying to

subdue Gillard, who had followed his wife to "Merry Mills," Chanler's home, near here. It was established at the inquest that the shot was not fired with intention into Gillard's head. This was testified to by Mrs. Gillard, her fourteen-year old son, and Ernest Money, who had called to see Chanler on a matter of business.

"Body is Bruised.

"Gillard's wife today bears the marks of the beating her husband had given her with a pair of century-old Brass tongs just before he met his death. It was the sight of these marks that brought
37 the jury to the understanding of the brutality which Chanler and his visitor, Money, had been called upon to subdue.

"John Gillard, with his wife and four children, came to Virginia about two years ago from Australia. Believing him to be worthy, Chanler had given him much aid. Chanler had just returned from New York, where he had been fighting to have the courts of the State adjudge him sane, as he is regarded in New York. Money had called upon him, and while Chanler and Money were discussing business affairs, Mrs. Gillard was announced. She had her four children with her.

"Attacks Wife.

"Before Chanler had gone downstairs, Gillard followed his wife into the house and began beating her with the pair of tongs. Chanler and Money answered the screams of the mother and children, and hurried downstairs. They overpowered Gillard, with the aid of two negro servants, and thought they had him quelled. After they had sent a negro to get a rope, Gillard again began fighting, and, in the struggle, tried to point a revolver held by Chanler at Mrs. Gillard, still prostrate on the floor. In the struggle, the weapon was discharged, and the .44-caliber bullet penetrated Gillard's brain, killing him instantly.

"Mrs. Gillard, who had been almost paralyzed with fear, was overjoyed, in a hysterical way, at the death of her husband, and today has not recovered from the shock of her experience.

"Funeral services were held today over the body of Gillard, at Campbell's station, where the Gillards lived.

Which offer was objected to by counsel for the plaintiff, which objection was sustained to which action of the Court in sustaining such objection counsel for the defendant then and there asked an exception, which exception was then and there duly entered upon the minutes of the Court.

Thereupon defendant offered in evidence an article appearing in The Evening Star of March 17, 1909, the offer being in the following language: "I offer an article in the Evening Star of March 17, containing a full account, together with a pictorial display of this location down there, and Chaloner's picture, and bearing on the same points. That article, however, as I recall it, does not use the

exact language 'Shot and killed' as the Times did." The article reads as follows:

38 "Chaloner's Gun Kills.

"Pistol Discharged in Struggle with Wife Beater.

"Woman's Life Menaced.

"Followed by Gillard to Her Refuge in 'The Merry Mills.'

"Accident is Jury Verdict.

"No One Blamed for Death of Englishman—Battle in Dining Room.

"Charlottesville, Va., March 17.—A tragedy at his home, the Merry Mills, near Cobham, Va., at 3 o'clock Monday afternoon, has thrust John Armstrong Chaloner into prominence again.

"A scene in which he was an involuntary actor ended in the death of an Englishman, John Gillard, in the presence of Gillard's wife and children.

"Gillard came to America two years ago from Australia. After a short time in Richmond he moved to the neighborhood of Cobham and thence to Campbells, about two miles from the Merry Mills. He was in poor circumstances and Mr. Chaloner had befriended him.

"It was notorious in the community that Gillard habitually maltreated his wife. Monday while Ernie Money was with Chaloner at the Merry Mills Mrs. Gillard and her children, the oldest of them a boy of fourteen, arrived and were admitted to the dining room by a servant.

"Was Beating His Wife.

"Mr. Chaloner being detained upstairs with Money, Gillard, who had followed his wife, reached the room before him. When Chaloner and his guest entered Gillard had his wife by the hair and was beating her over the head with a heavy pair of tongs.

"Both men interfered and tried to restrain Gillard both by force and persuasion, but he was in a frenzy. Being a powerful man, it required both of them and a negro servant to get Gillard under even temporary control.

"When this was done the servant was sent for a rope with which to tie Gillard. Mr. Money was holding the man and Chaloner stood by with his pistol to intimidate him.

"Gillard, while the servant was absent, resumed the struggle and grasped the pistol, which was discharged. The bullet struck him in the temple, causing instant death.

"Inquest Held Yesterday.

"Quintus L. Williams, the local magistrate and coroner, took charge of the body, which was left in the room until after the in-

quest, which was held yesterday. The witnesses at the in-
39 quest were the widow and her fourteen-year old son, Chaloner, Money, and the negro servant. The witnesses were separated, Chaloner being the last to testify.

"Mrs. Gillard's story was that her husband had threatened her life, and had on Saturday and Sunday severely beaten her. In great fear she had gone to the Merry Mills for protection.

"The servant admitted her to the dining room. While she was waiting to see Chaloner to ask his protection Gillard entered, seized her by the hair, and was beating her over the head with a pair of tongs. She was covered with blood when Chaloner and Money came to her assistance.

"She said that they directed their efforts to restrain her husband, and that Chaloner said they had no desire to hurt him, but only to turn him over to the officers of the law and let the law take its course.

"Thinks Husband Killed Himself."

"Mrs. Gillard said that her husband seized the pistol and endeavored to turn it upon her; that during the effort, the weapon was exploded, and in her opinion her husband had discharged it.

"Her son told the same story, except that he was not prepared to say how the pistol was discharged. He was positive that his father intended to kill his mother and that he would have done so but for Chaloner and Money.

"The testimony of Chaloner, Money and the servant was of the same tenor.

"A man who was present during the inquest said that Mrs. Gillard had been shamefully beaten and her head badly cut in many places.

"The room was still in the condition as at the moment of the shooting, the woman's hat lying on the floor and hairpins scattered about. The tongs were bloody and bent from the blows.

"Chaloner was never under arrest. The first investigation showed to the satisfaction of the magistrate that he was not guilty of any crime, and the jury's investigation bore him out.

"The members of the panel were Charles E. Dickinson, foreman; K. Page, W. W. Johnson, J. W. Sampson, W. S. Pettus and Dr. Mann Page.

"The jury found that the victim came to his death by the accidental discharge of a revolver in the hands of himself and Chaloner during a scuffle, in which Chaloner was in good faith attempting to prevent Gillard from shooting his wife.

"Promised Aid for Divorce.

"It was two weeks ago that Mrs. Gillard first reported to Chaloner the cruelties she endured at the hands of her husband. On Saturday, Sunday and again on Monday she was beaten. It was on the latter day that she decided to take her children and flee.

"Gillard had attempted to beat the plucky woman into submission after she had determined upon asking Chaloner's assistance in securing a divorce. Chaloner had promised to do this for her, and more—he had promised to furnish transportation for herself and children to Cornwall, England, where, Mrs. Gillard claims, she has relatives who will take care of her. Chaloner says he will fulfill his promise to send the woman and her children home.

"Hopes It Will Help Her Case.

" 'Thank God that ends it,' was Chaloner's remark when the verdict of the jury was read in his presence. 'This will help my case in New York. I will be glad to have my relatives know, since I have killed a man, that the act was committed in the defense of a helpless woman. This case should prove, more than anything else, that I am capable of taking care of my own affairs.

"A singular thing in connection with the tragedy is that the standing clock in the hall at the Merry Mills, which has kept exact time for many months, and which was attended by Gillard, stopped almost in the minute of the time he was killed. The clock, a handsome one, was made by Thomas Ayres, the celebrated clocksmith of London. Chaloner says he purchased it many years ago, and that it was one of the many things that went wrong during the years of his imprisonment in Bloomingdale.

"Chaloner Guards Victim's Body.

"All through the long night Chaloner sat as a guard over the body of his victim. There was no other person in the house.

" 'To test my nerves,' says Chaloner, 'and to see whether I am the insane man the New York courts regard me, I went several times to look at the distorted features. I realized fully the circumstances, and I knew how ghastly such a scene would appear to the outside world.

" 'I did not feel that I was a murderer, although I expected to be taken to the Charlottesville jail, and there to be tried for a crime, conviction of which would mean the electric chair.' "

"Chaloner's Long Struggle to be Declared Sane Man.

"John Armstrong Chanler, a brother of former Lieut. Gov. Lewis Stuyvesant Chanler of New York, recently had his name changed by the North Carolina courts, because of a long series of legal controversies with members of his family, to Chaloner, the old form of the family name.

"He first got into the newspapers in 1895, when it was announced that Amelie Rives, the authoress, whom he had married in 1888, had got a divorce from him in South Dakota on the ground of incompatibility of temperament. The next year Miss Rives married Prince Troubetskoy.

"In 1897 Chaloner was alleged to be mentally incompetent by his relatives, and was declared insane by the courts and sent to Bloomingdale Asylum in New York City.

41 "Thomas T. Sherman was put in charge of his estate. He made various legal efforts to get out of Bloomingdale, and finally escaped Thanksgiving Day, 1900.

"He was lost to view until the next September, when he appeared on his extensive estate, Merry Mills, near Charlottesville, Va., and at once brought legal proceedings to have himself declared sane before efforts to the contrary could be made by his relatives. He also commenced suit against Sherman to have his property in New York state returned to him. He named $263,523 as the amount demanded from Sherman.

"Defense of Chaloner.

"In another action brought in Virginia to establish his sanity Chaloner appeared in court last October and testified that his brother, the former lieutenant governor, made out a false certificate in order to commit him to an asylum. He based this statement on a petition in which Lewis Stuyvesant Chanler stated matters as occurring at Merry Mills of his own knowledge when he had not been there and could not have known of them of his own knowledge.

"He also testified that when ever he went to the Knickerbocker Club the members of the club annoyed him by ill-mannered facetiousness and ill-bred spying.'

"He said that when he first courted Amelie Rives she refused him because he wore a French beard, and for that reason he cut it off. He said that trouble between himself and his brother first arose because Winthrop Chanler sent him a copy of Miss Rives' book 'The Quick and the Dead' with hostile criticisms marked on the margin in blue pencil.

"Allowance is Increased.

"Several days ago counsel for Chaloner appeared in court here and asked for an increase in the allowance of $10,000 a year which he gets from his trustee. He said he needed at least $13,000 a year to maintain his position as proprietor of an estate in Virginia. The application was granted.

"Chaloner is said to be worth more than $1,000,000. He has not been in New York state since he ran away from Bloomingdale, fearing that he would be arrested as an escaped lunatic as soon as he set foot here. He asked for a writ of prohibition in the federal court here last year to allow him to enter New York, but the writ was denied.

"Chaloner has been described by his relatives as an incurable paranoiac. The experts who testified against him said he had hallucinations that his stomach was a Leyden jar and his body a silver case and that he had X-ray eyes.

"Several years ago Chaloner gave extensive circulation to a book

written by him in which he described his experiences at Bloomin
dale. He announced last fall that he had in preparati
42 an arraignment of the lunacy laws of New York which
thought would result in their amendment."

To which offer counsel for the plaintiff objected, which objecti
was by the Court sustained, to which action of the Court in su
taining such objection the counsel for the defendant asked an exce
tion, which exception was then and there duly entered upon the mi
utes of the Court.

It was agreed that the formality of proving the printing and pu
lication of the said newspapers would be waived, and it is assum
that these facts were proved in the regular way.

Thereupon William P. Spurgeon was recalled as a witness by t
defendant, and was asked the following question:

Q. Mr. Spurgeon, I want to ask you whether or not, in publis
ing this article of April 3, 1909, you had any idea or intent
charging Mr. Chaloner with the crime of murder, either in the fi
or second degree?"

To which question objection was made by counsel for the plai
tiff, which objection was sustained; to which action of the Court
sustaining said objection counsel for the defendant then and the
asked an exception, which exception was then and there duly e
tered upon the minutes of the Court.

Witness further testified that the story of March 17 came over t
wire from Charlottesville, and was published in the words in whi
it came over the wires to the Post, and was not changed except th
it would be a change due to error in transmission, or possibly so
superfluous words that the reporter put in.

Thereupon the following occurred:

"Mr. Lambert: I want to direct your Honor's attention to t
or three lines right in there, in that paper. It reads:

" 'Mrs. Gillard's eldest son corroborated her story, as did her t
servants and Mr. Money and Mr. Chaloner. The latter (that is, M
Chaloner) declared he had no intention of firing on Mr. Gillar
He merely held the revolver aimed at him to intimidate him.'

"That appears on page 3 of the issue of the Post of Wednesd
morning, March 17, 1909, and that much of this article, based
the testimony already given by Mr. Spurgeon, I want to offer
evidence as bearing on the question of malice, of mitigation
damages, or for such other purposes for which it may be pertinent.

"Mr. Colladay: I object on the same ground as before urged, th
the part of the article now offered was published about two wee
prior to the article in suit, and is not competent as bearing on t
motive of the defendant in publishing the particular article whi
is the basis of the suit. It is entirely disconnected with it.

"The Court: Before passing on this let me ask counsel a questio
Mr. Colladay, as I understand, you take the position that the Cou
of Appeals in this case, when it went up on demurrer, held that th
amounted to a charge of murder per se?

43 "Mr. Colladay: Yes, sir; that is our position.

"The Court: You claim that that is what the words mean.

"Mr. Colladay: Yes.

"The Court: And you are not seeking to recover on the theory that they amount to a charge of manslaughter?

"Mr. Colladay: No.

"The Court: That question will not be submitted to the jury, so far as your requests are concerned?

"Mr. Colladay: No, your Honor.

"The Court: I do not see how this would help the defendant. Mr. Lambert's plea of justification is that the words were true, not with the meaning attached to them in the declaration, which is murder, but in some other sense in which they were used, so that so far as the plea of justification is concerned, there would not seem to be any attempt at justification. The defendant does not claim that it was murder in fact. It does not claim so in its plea, and does not in its position now taken. The only question now is——

Mr. Lambert (interrupting): On the general issue.

The Court: Of course, under the general issue you can show in mitigation of damages various things. I understand that what did occur has been shown. That may be used in mitigation. Suppose this article were made up out of the whole cloth. It would be a different case from what did occur. What did occur has been shown by the plaintiff himself. That can be used in mitigation, I suppose. The question now is whether this information which the Post had tends to mitigate any damages, or show that there was no malice in charging him with murder. How does it tend to mitigate to show that it was not murder, or that he and Mrs. Gillard and Mrs. Gillard's son said that it was not murder?

Mr. Lambert: He himself gives the description of it. From that is shown what the intent must have been with which the words were used on April 3.

The Court: The reading public reading the article and not having read the other would not know anything about that.

Mr. Lambert: I want to get at the intent with which it was used.

The Court: The trouble is, this is very prejudicial. It contains what purports to contradict the statement which the plaintiff made on the stand, that he was aiming at him at the time, which he denies now.

Mr. Colladay: We object also on the ground that this would tend to impeach Mr. Chaloner in a matter purporting to be uttered by him, and of which there is no competent evidence. This is not competent evidence of it having been uttered by him. It tends to contradict him in his own testimony, and a newspaper account of this sort cannt be used, either directly or indirectly, to contradict a witness. It is merely hearsay.

Thereupon the aforementioned quotation from the Washington Post of March 17th, 1909, was again offered in evidence, was objected to by counsel for the plaintiff, which objection was sustained by the court, to which action of the court in sustaining said objec-

tion, counsel for the defendant then and there asked an ex-
44 ception, which exception was then and there duly entered upon the minutes of the court. He has not been able to refresh his recollection in any way with reference to the article of April 3rd, cannot recollect any details in connection with that story. He knows, of course, it must have been received.

Thereupon the defendant, to further maintain the issues on its behalf joined, called as a witness the plaintiff, who testified that on the night of March 15th, 1909, after the shooting of Mr. Gillard, he did not sit up with his body, and that he did not on the following day make the remark that he sat up with him to test his nerves. The witness was then shown a photograph taken of himself in October, 1912, on horseback at the Merry Mills on the lawn, within one hundred feet of the house, which he identified as that of himself. Thereupon the said photograph was offered in evidence, which said offer was objected to by counsel for the plaintiff, which objection was sustained, to which action of the court in sustaining said objection counsel for the defendant asked an exception, which exception was then and there duly entered upon the minutes of the Court.

It is agreed that said photograph may be produced at the hearing of this case on appeal and used in the same manner as if the same had been set out in this bill of exceptions.

Thereupon defendant's counsel was requested to step to the bench instead of propounding questions in the presence of the jury, and at the bench proposed to ask the witness if he did not on one occasion hold up his wealthy neighbor, Bernard S. Horn, and at the point of a pistol make him lead his horse around Horn's auto in Virginia; which offer of questioning and proof the Court thereupon excluded, to which action of the Court in excluding said offer and proof the counsel for the defendant asked an exception, which exception was then and there duly entered upon the minutes of the Court. This occurrenec was subsequent to the publication of the article complained of.

This is the substance of all the testimony offered on behalf of the defendant.

This is the substance of all the testimony taken in the case.

Thereupon the defendant moved the Court to direct a verdict for the defendant on the ground that the article is not susceptible of the meaning attempted to be attributed to it, in view of the testimony presented in this case; which motion was by the Court overruled, to which action of the Court in overruling such motion counsel for the defendant asked an exception, which exception was then and there duly entered upon the minutes of the Court.

Whereupon the plaintiff offered the following prayer:

5. "The jury are instructed that the words contained in the publication sued on by the plaintiff herein imply that the crime of murder had been committed by the plaintiff and are actionable per se."

Which said prayer was then and there granted by the Court, to

which action of the Court in granting said prayer counsel for
45 the defendant then and there asked an exception, which exception was then and there duly entered upon the minutes of the Court.

Whereupon the defendant offered the following prayers:

I.

"The jury are instructed that the plaintiff in his declaration has limited himself to the averment of an intent on the part of the defendant to charge him with the commission of the crime of murder by the article complained of. Therefore, unless they determine that the publication complained of in terms charges the plaintiff with the crime of murder in the first or second degree, the plaintiff cannot recover on the ground that the said publication is libelous per se, and in the absence of proof of special damage, their verdict must be for the defendant."

II.

"The jury are instructed that the plaintiff in his declaration has limited himself to the averment of an intent on the part of the defendant to charge him with the commission of the crime of murder by the article complained of. Therefore, they must find that the publication complained of was such as to cause the public to reasonably infer from reading it that the plaintiff had been guilty of the commission of a murder in the first or second degree before the plaintiff can recover on the ground that the said article is libelous per se, and in the absence of such a finding and proof of special damage, their verdict must be for the defendant."

III.

"The jury are instructed that under the law murder in the first degree is defined as follows: 'Whoever, being of sound memory and discretion, purpose, and either of deliberate or premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate any offence punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree.'

"The jury are further instructed that murder in the second degree is defined as follows: 'Whoever with malice aforethought * * * kills another is guilty of murder in the second degree' except as provided in the foregoing definition of murder in the first degree. Therefore before they can find that the plaintiff in this case is entitled to recover on the ground that the article complained of is libelous they must find that the said publication in terms charges the plaintiff with the commission of the crime of murder either in the first or second degree as hereinbefore defined or that such publication is such as to cause the public to reasonably infer from reading it that the plaintiff had been guilty of the commission of the said crime of murder either in the first or second degree as hereinbefore defined."

IV.

"The jury are instructed as a matter of law that before they can find that the article complained of herein is libelous per se they must find by a preponderance of the evidence that the meaning ascribed in the declaration by the plaintiff is the true meaning of said article."

V.

"The jury are instructed as a matter of law that should they find from the evidence that the article complained of herein has not the meaning attached to the same by the plaintiff in his said declaration, and that the meaning of the said article is innocent and not a libel upon the plaintiff, then there can be no recovery by the plaintiff on the ground that such article is libelous per se."

VI.

"The jury are instructed as a matter of law that unless they find from the evidence that the article complained of herein was maliciously written of and concerning the plaintiff and that the said article injured, or tended to injure, the plaintiff's reputation, then there can be no recovery on the ground that such article is libelous."

VIII.

"The jury are instructed as a matter of law that the truth of alleged defamatory words, if pleaded, is a complete defense to any action of libel. You are, therefore, instructed that in this case there has been filed a plea of justification of the article complained of because of its alleged truth, and if you find from a preponderance of the evidence that the allegations of the alleged defamatory article are true in substance and in fact, then your verdict must be for the defendant."

IX.

"The jury are instructed as a matter of law that in passing upon the question whether or not the plea of justification filed herein is sustained, they need only find by a preponderance of the evidence that the statements contained in the article complained of are substantially true in fact, and if they so find, then their verdict must be for the defendant."

To each and every of the above prayers of the defendant, the plaintiff, through his counsel, then and there objected at the time each was offered; objection to all said prayers being sustained by the Court, and exception duly asked, said exceptions were then and there at the time each was taken duly entered upon the minutes of the Court.

Whereupon the Court Charged the jury as follows:

47 STAFFORD, J.:

"Gentlemen, in this case the plaintiff is seeking damages against the Washington Post for the publication of this article. The article constitutes a libel in itself, because it has been construed by the Court of Appeals, when the declaration went to the Court of Appeals before, that it amounts to charging the plaintiff with the crime of murder; at least, in the second degree—of having unlawfully killed Gillard, and not in such circumstances as would afford any excuse or justification for it. 'And as the case stands upon the evidence, I am obliged to tell you that the article does constitute a libel, and the defendant, having published it, is liable to the plaintiff therefor in at least nominal damages.

"The only question really, for you to consider, is how much damages the plaintiff should be allowed. You ought to allow him compensation; no special damages have been shown, and only general damages can be allowed, but where the libel is published, where words are published of the plaintiff which constituted a libel, which charge him with having committed a crime, for instance, as in this case, the law presumes that the plaintiff has been damaged, without proof of any special damage, because the law takes notice of the fact that a libel travels, and it comes to a great many different readers, and that it would be impossible for a plaintiff to trace out the circulation of the libel, and show by whom it had been read, and how it had affected their opinion of him, and all that; so that the jury are justified in allowing substantial damages to a plaintiff against whom a libel has been published, without proof of any particular or substantial damage to him. And it is a question of good judgment upon your part as to what would be fair compensation, and in determining the question what is fair compensation you have a right and ought to consider the standing of the plaintiff, his history, his character in the community, his reputation as shown by the evidence before you; consider all these circumstances in determining how much he has been injured by the publication of the libel; and then you are also to consider the circumstances out of which the libel sprang—what, in fact, did occur down at Merry Mills on the day in question. The defendant has a right to have you consider the circumstances, if in any degree they tend to mitigate the damages. It is admitted that something did occur down there; a tragedy did occur; it is not as if the libel had sprung out of nothing, as if it had been made out of whole cloth; it is admitted there was a tragedy; that there was the explosion of the pistol, and there was the death of a man in consequence, and you have heard described here the occurrence itself by the eye witnesses.

"You will have the right to consider all those circumstances in making up your minds how much the plaintiff has been damaged, and how much the defendant ought to be adjudged to pay by reason of having published this article.

"I do not think I can help you any further. The evidence is

all before you; you remember it, I think, and it is entirel
48 in your province to determine what is a fair sum to b
awarded to the plaintiff."

"Mr. Lambert: I except to so much of your Honor's charge s
says it is libel per se.
"The Court: Yes."

And all the exceptions hereinbefore referred to were noted on th
minutes of the Court as they were severally taken, and the defendan
prays the Court to sign and seal this bill of exceptions, to have th
same force and effect as if the rulings herein contained were set ou
in separate bills of exceptions; which is according- done this 4t
day of October, 1916, nunc pro tunc.

WENDELL P. STAFFORD, *Justice.*

No objection.
E. F. COLLADAY,
Att'y for Pl'ff.

[Endorsed:] No. 52406. John A. Chaloner v. Wash. Post C
Bill of exceptions. May 26'-16, M. 64, p. 32. Bill of Exception
submitted. Time to file transcript extended to July 3/16 incl.

Endorsed on cover: District of Columbia Supreme Court. N
3025. The Washington Post Company, a corporation, appellant, v
John A. Chaloner. Court of Appeals, District of Columbia. File
Oct. 6, 1916. Henry W. Hodges, clerk.

FRIDAY, October 5th, A. D. 1917.

* * * * * * *

No. 3025.

THE WASHINGTON POST COMPANY, Appellant,

vs.

JOHN A. CHALONER.

The argument in the above entitled cause was commenced by Mr. W. J. Lambert, attorney for the appellant.

MONDAY, October 8th, A. D. 1917.

* * * * * * *

No. 3025.

THE WASHINGTON POST COMPANY, Appellant,

vs.

JOHN A. CHALONER.

The argument in the above entitled cause was continued by Mr. W. J. Lambert, attorney for the appellant, and was submitted to the consideration of the Court on the printed record and appellee's brief filed herein by Messrs. E. F. Colladay and John Ridout, attorneys for the appellee. On motion, the appellant is allowed to file additional authorities herein if so advised.

Court of Appeals of the District of Columbia.

No. 3025.

WASHINGTON POST COMPANY, a Corporation, Appellant,

vs.

JOHN A. CHALONER, Appellee.

Opinion.

Mr. Chief Justice SMYTH delivered the opinion of the Court:

This is an action for libel. The article complained of was published by the defendant in The Washington Post of April 3, 1909, and is as pleaded: "John Armstrong Chaloner (Chanler) (meaning the plaintiff), brother of Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess

Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home. Following the shooting, Chaloner suffered a nervous breakdown, and was ordered by his physician to take a long rest. He decided to visit his old friend, Maj. Emry, who, with Chaloner, was instrumental in founding Roanoke Rapids, a manufacturing town five miles from Weldon. Chaloner arrived at Weldon after traveling all night and was immediately hurried to Shadeland, where he received medical attention and temporary relief."

Defendant demurred on the ground that the article did not charge a libel per se. The demurrer was sustained and, plaintiff electing to stand on his declaration, judgment of dismissal was entered. An appeal was taken to this court, where the judgment of the lower court was reversed, this court holding that the article was libelous per se, and the case was remanded for a new trial. The defendant pleaded the general issue. Later it added the following plea: "And for a further plea in this behalf defendant says that the said plaintiff ought not to have or maintain his aforesaid action against it, the defendant, because the said defendant says that the article and words complained of by the plaintiff in the declaration are true in substance and in fact according to the natural and ordinary signification and without the meaning imputed to them in the several innuendoes contained in the said declaration. Wherefore the defendant at the time mentioned in the said declaration, published of and concerning the plaintiff the said several words in the said declaration mentioned, as it was lawful for it to do for the cause aforesaid, and this the defendant is ready to verify." There was a verdict for the plaintiff in the sum of $10,000, and the defendant brings the case here for review.

The first question presented is whether or not the publication was as a matter of law libelous per se. This is foreclosed by our decision on the former appeal, which was binding on the lower court and is equally binding on this court, as the law of the case. The circumstances in which the subject was first presented to us have not been changed. The language construed in the declaration at that time and from which we drew the legal conclusion that it was libelous per se is the same language upon which we are asked to pass judgment now. Where this is so, the former judgment must be treated as closing the question, and prohibiting a re-examination of it on a second appeal. Unless this be true, litigation might become interminable. The authorities supporting our conclusion are well nigh unanimous. We cite but a few. In Messinger v. Anderson, 171 Fed., 785, Judge Lurton, afterwards Mr. Justice Lurton, speaking for the Circuit Court of Appeals said "that every question of law or fact which was before this court upon the first writ of error and decided by its opinion, was thereby conclusively settled, both for the court below and for this court upon subsequent writs of error, is not open to serious debate. That matters not decided upon the first writ are open for considera-

tion in the lower court upon a second trial is, of course, true * * *; but so far as questions of fact or law are specifically decided, and the cause remanded for further proceedings, the court below is not at liberty to re-examine any such decided matters, but must proceed in conformity to the mandate as interpreted by the opinion of this court;" citing many authorities.

Judge Van Devanter, when sitting as a circuit judge, gave utterance to similar language in Brown v. Lanyon Zinc Company, 179 Fed., 310: "We are requested" he said, "to reconsider our prior ruling that no infringement resulted from the use of the Cappeau type of furnace, with the rabble operating mechanism in an open or uninclosed space underneath the main roasting chamber, but this we may not do. That ruling turned upon the interpretation of the claim in suit and is now a part of the law of the case, whether it was right or wrong. It was adhered to after due consideration of a timely petition for a rehearing, and the Circuit Court, as in duty bound, has respected and enforced it in the subsequent proceedings. True, it was made upon an appeal from an interlocutory decree granting an injunction, but that did not render it less obligatory upon the Circuit Court, and does not except it from the settled rule that propositions once decided by an appellate court are not open to reconsideration in that court upon a subsequent appeal or writ of error. Smith v. Vulcan Iron Works, 165 U. S., 518, 525, 526; in re Potts, 166 U. S., 263-267; U. S. v. California, etc., Land Company, 148 U. S., 31-38; in re Sanford Fork and Tool Co., 160 U. S., 247-255; Illinois v. Illinois Central Railroad Co., 184 U. S., 77, 90-93." See also Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 144 Fed., 476; Roth v. Mutual Reserve Life Ins. Co., 162 Fed., 282; Development Co. v. King, 170 Fed., 923; Mutual Reserve Fund Life Ass'n v. Ferrenbach, 144 Fed., 342.

Nor is it material that the former decision of this court was a judgment reversing the lower court and directing a new trial. Justice Lurton, in the Messinger case, supra, quotes with approval the following language from Mr. Justice Field upon this point: "If, upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court can not recall the case, and reverse its decision, after the mandate is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone; and, if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below." (Lesser v. Clark, 20 Cal., 387.) (See also Mutual Life Ins. Co. v. Hill, 193 U. S., 551; Western Union Tel. Co. v. City of Toledo, 121 Fed., 734; Stoll v. Loving, 120 Fed., 803; Tyler v. Magwire, 17 Wall., 254; Young v. Frost, 1 Md., 394; Haley v. Kilpatrick, 104 Fed., 647; Orient Ins. Co. v. Leonard, 120 Fed., 808; Mathews v. Columbia Bank, 109 Fed., 393; Theological Seminary v. People, 189 Ill., 439-452.)

It is next urged that the court erred in refusing to submit to the

jury the truth of the publication as pleaded. But defendant had withdrawn his plea of justification and was not therefore entitled to have the jury pass upon it. We quote from the record: "The Court. Mr. Lambert's plea of justification is that the words were true, not with the meaning attached to them in the declaration, which is murder, but in some other sense in which they were used, so that so far as the plea of justification is concerned, there would not seem to be any attempt at justification. The defendant does not claim that it was murder in fact. It does not claim so in its plea, and does not in its position now taken. The only question now is——" "Mr. Lambert (interrupting). On the general issue." This is equivalent to a statement by Mr. Lambert, counsel for defendant, that the only question then before the court was on the general issue. Under that issue it was not competent to prove justification, for the latter must be specially pleaded. (Brown v. Burnett, 10 Ill. App., 279; Dough v. Pierce, 13 Ala., 127; Bricket v. Davis, 21 Pick., 404; Watson v. Hamilton, 6 Rich., (S. C.) 75.)

Appellant says that the court erred in admitting over its objection evidence that the reputation of the plaintiff was "excellent," that his social standing was "that of a high-toned honorable gentleman in that community," and that he had "an honorable, upright reputation among his neighbors, considered as a man of first-class character, a man of broad charities," and that witness never heard his reputation for peace and good order questioned. The point of the objection is that since the law presumed that plaintiff's reputation was good it was not competent for him to offer testimony upon the question until it was assailed by proof from the defendant. There is authority for the proposition that a plea of justification is an attack upon the reputation of the plaintiff and that under such circumstances he may in making out his case in chief offer proof upon that subject. (Cooper v. Phipps, 24 Ore., 357-362; Ratcliffe v. Louisville Courier-Journal, 99 Ky., 416; White v. Newcombe, 25 App. Div., 397; Cox v. Strickland, 101 Ga., 482; Abbott's Trial Evidence (2d Ed.), 847 et seq.). Whether or not the plea of justification without more constitutes an attack upon plaintiff's character, we are of the opinion that the evidence was properly received. The plaintiff was entitled to recover compensatory damages; that is, damages which would compensate for the loss which he sustained by the publication of the libel. Anything less would not give him what the law provides he should have. In order that the jury might have before it all the data from which to determine what would constitute adequate damages for the plaintiff it was necessary that it should have full knowledge in respect of the nature of his reputation. Unless it did, it could not measure it correctly and therefore could not say with accuracy how much it had been damaged. The law presumes that the plaintiff's reputation was good, but he was not willing to accept that as the proper standard by which to measure it. He said that it was more than good—it was "excellent," "first class." To the mind of the jury the word "good" might indicate an ordinary reputation, while "excellent" and "first class" would describe something much better; and if the plaintiff possessed such a reputation he was entitled to have the jury know it. If the presump-

tion of law gave him what was equivalent to an excellent or first-class reputation, then the evidence objected to afforded him nothing more than the presumption gave him and appellant has no cause for complaint. If on the other hand, it did not give him as much as the testimony did, he was entitled to the latter because otherwise the jury would lack the evidence on which to base a verdict that would adequately compensate him. The courts as well as the text writers are not in harmony upon this subject, but we think the weight of authority is in favor of the right of the plaintiff to prove as a part of his case in chief the nature and extent of his reputation.

The Circuit Court of Appeals for the Second Circuit, speaking through Judge Lacombe, went into the question at great length, reviewing with care the English and American authorities upon the subject, and reached the conclusion that it was competent for the plaintiff in his affirmative case to offer testimony bearing upon his character. In that action as in this, it was urged that the testimony was offered "for the purpose of bolstering up the case before the jury in order that if the jury should be informed that the defendant in error was a man in very high position in the world, they could only pay him for his wounded feelings by a verdict out of all proportion to that which would be given to an ordinary citizen." But the court answered that the testimony was competent, saying "We are of the opinion that the weight of authority is clearly in support of the proposition that the condition in life of the plaintiff may properly be given in evidence in chief to aggravate damages. * * * While it is true that plaintiff's character and reputation morally are presumed to be good, and therefore need not be proved by him to be such unless attacked, there seems no sound reason for holding that he may not prove his station in society as part of his testimony in chief, in view of the statement in Gilman v. Lowell, which (despite the decision in Prescott v. Tousey) is still the law of this State, that 'persons in different stations would be differently damnified by the same slander.'" (Press Pub. Co. v. McDonald, 63 Fed., 238, 242, 244.) Later a similar question came before the same court in the suit of the New York Evening Journal Publishing Company v. Simon, 147 Fed., 224. The testimony in that case was quite like the testimony in the case at bar. The court speaking of it said: "The only other exception is to the admission of evidence that the 'general reputation of the plaintiff was very high as an officer and a man.' It is not necessary again to discuss this question. We considered the whole subject and the many conflicting decisions of different courts in Press Pub. Co. v. McDonald, 63 Fed., 238, and held that such general testimony, not, however, extended to minuter details, might properly be put in proof." A petition for writ of certiorari was made in this case to the Supreme Court of the United States and denied. (203 U. S., 589.) In the case of Post Publishing Company v. Peck, 199 Fed., 6, the Circuit Court of Appeals for the First Circuit, speaking through Judge Aldrich, said: "We do not agree with the position of the defendant that it was not open to the plaintiff, in his affirmative case, to show his standing in, and capacity to earn through, his profession, because under the theory which governed the trial, a theory which is

thought to be the right one, the plaintiff's reasonable damages would, in a measure, directly and peculiarly depend upon these elements." Citing 2d Greenleaf on Evidence, sec. 275, and the McDonald and Simon cases, supra, also Chesley v. Thompson, 137 Mass., 136.

In McClure Co. v. Philipp, 170 Fed., 910-912, a libel case, the plaintiff was allowed to testify in making out his case in chief that the publication complained of caused him to "feel worse." The court said: "In the case at bar, with all the facts relating to the plaintiff's domestic, social and business relations established, argument as to effect of the false charges upon his mind might, it would seem, have been presented as effectively without the testimony complained of as with it. Before coming to the question of damages the jury necessarily had to reach the conclusion that the defendant had falsely accused the plaintiff of being a criminal and the conclusion that he had suffered great mental anguish from such a charge would naturally follow. But what may be considered by the jury may be proved, and where the question relates to the mental suffering of the plaintiff no witness can speak ex cathedra but the plaintiff himself." Applying the rule of that decision to the case at bar may it not be said that since the jury might consider the presumption that plaintiff possessed a good reputation there was no error in receiving proof of it. In Stark v. Knapp, 160 Mo., 529, it was held that the good character of plaintiff is admissible in chief as bearing upon the question of damages. * * * To the same effect see Larned v. Buffington, 3 Mass., 546; Enos v. Enos, 135 N. Y., 609; Morey v. Morning Journal Ass'n, 123 N. Y., 207; Russel v. Washington Post, 31 App. D. C., 277; White v. Newcomb, 25 App. Div., 397; Bennett v. Hyde, 6 Conn., 24; Adams v. Lawson, 17 Grat. (Va.), 250; Fountain v. Boodle, 3 Q. B., 5. It is earnestly contended by appellant that while there are many decisions holding that plaintiff in his case in chief may offer testimony as to his station in life, only a few hold he may give evidence of his general reputation. But why the distinction? Every rule of law is supposed to rest upon reason. The reason which permits plaintiff to offer in chief testimony relating to his station in life would support his offering testimony bearing upon his general reputation. In each case he is seeking to aggravate his damages beyond what they would be if he was required to rest upon the presumption of law alone; and if it is proper for him to do it in the one case it seems to us it must be proper for him to do it in the other. The libel attacks plaintiff's character. Why should he be required to wait until the defendant, the wrong-doer, sees fit to offer evidence in support of his assault before he, the plaintiff, may offer evidence in vindication of his good name. (Bennett v. Hyde, supra.) And in the Adams case, supra, the author of the opinion observed: "It does not appear to me to be a satisfactory answer to say that the plaintiff ought to stand upon the presumption which the law makes, in the absence of evidence to the contrary, that his character is good. * * * I am not aware of any case in which a mere presumption that a fact exists, which is liable to be rebutted, is held to preclude a party in whose favor the presumption is made from introducing evidence to prove that the fact is really so. And besides, the character

of the plaintiff is always impeached when the slander or libel imputes crime or moral delinquency * * *." In the leading case of Press Publishing Company v. McDonald, supra, the testimony referred to general social standing only, but in the Simon case, supra, decided later by the same court, the witness said that "the general reputation of the plaintiff was very high as an officer and a man"—quite similar to the testimony objected to in this case—and the court held that it was properly received on the authority of the McDonald case, this indicating that there was no distinction, so far as the rule of admissibility was concerned, between testimony bearing upon the general reputation of a plaintiff and testimony having relation to his business or social standing, and we think there is none.

In view of what we have said and the decisions referred to, there was no error in admitting the testimony offered by plaintiff in making out his affirmative case with respect to his reputation.

It is also asserted that there was error in admitting testimony showing the condition of Mrs. Gillard's head as a result of the attack made upon her by her husband, because, as appellant says, it was of an inflammatory and prejudicial nature. The death of Gillard referred to in the libelous publication occurred in these circumstances. He lived near the residence of the plaintiff at Merry Mills, Virginia. His wife, to escape from a savage attack which he had made upon her sought protection in the home of the plaintiff. Gillard pursued and again attacked her, beating her brutally over the head with a pair of tongs. Chaloner interfered to protect her. He held a revolver in his hand. Gillard seized the pistol and endeavored to turn it upon his wife. In the struggle that ensued the weapon was discharged and Gillard killed. At the time the testimony complained of was received, the defendant's plea of justification was still in the case. Plaintiff was therefore required to show that the publication was not true, for he had been challenged to do so by the plea of justification. In doing this, it was necessary to describe the circumstances in which the killing took place. The testimony referred to was a part of that description, and was properly admissible. "Where the defendant relies on justification plaintiff may show the circumstances of the transaction charged relevant to the issue of his innocence including his own declaration as part of the res gestae." (Abbott's Trial Evidence, p. 839; Palmer v. Haight, 2 Barb., 210; Gandy v. Humphries, 35 Ala., 617; 2 Wharton on Evidence, sec. 1102. Langton v. Hagen, 35 Wis., 150.)

The next and final error assigned is that the court erred in excluding copies of The Washington Post, Washington Times, and The Evening Star, containing accounts of the tragedy resulting in the death of Gillard and plaintiff's connection therewith published on the 17th of March, 1909, sixteen days before the libelous publication appeared. It is claimed that these articles should have been admitted as tending to mitigate the damages. We will first consider the article in The Washington Post, which is published by the appellant. This article represented the plaintiff as saying that he was aiming the revolver at Gillard at the time it was discharged. In his testimony he denied it. If the article was admitted in evidence it would be a

contradiction of that testimony. As it was clearly hearsay it could not be received for that purpose and since it was offered as a whole there was no error in rejecting it. But apart from this, the article in the Post had no sufficient tendency to mitigate damages. If A published an article charging B with murder and the next day or soon thereafter published another article retracting the statement and stating that there was no truth in it he would thereby tend to lessen the evil effect produced in the minds of the readers of the first article, and consequently the damages done to the reputation of the person libelled by it; but we do not think that an article published 16 days before the appearance of the libelous publication would have any effect to dilute the poison carried to the minds of the readers of the subsequent article. The publication tendered in evidence was not of course a retraction because it preceded the libelous article in point of time. It gave an account of the killing which indicated that Chaloner was not guilty of murder. The subsequent or libelous article charged him with murder. We do not think that the first article published as it was sixteen days before had any tendency to show that the last article was not true. It was too remote. To say that it had such tendency would be to indulge in a conjecture too unsubstantial to be of practical value in the administration of justice. Appellant has called our attention to no decision or text which supports its contention, and we have not been able to find any. Many of the authorities which appellant cites state that the circumstances surrounding or attending the publication of the libel may be given, and with this we are disposed to agree. But the rejected publication could not be said, with any regard to the ordinary meaning of words, either to surround or attend the publication of the libelous article in this case, since sixteen days had intervened between the two events.

By a parity of reasoning the articles in The Times and Star, being of the same general nature as the one in The Post and published on the same remote date, were properly excluded. As bearing upon the admissibility of the articles in The Times and Star the decision of this court in Washington Herald Co. v. Berry, 41 App. D. C., 322, is in point. The Herald Company was charged with libel. It offered publication in The Times and Star relating to the occurrences out of which the libel case arose which had appeared the day before the libelous article was issued, but they were excluded, this court saying through the then Chief Justice "that other papers may have published articles relating to the plaintiff and his controversy, whether libelous or not, afford no justification for defendant's publication." (See also Newell Slander and Libel, 1075.)

The record not disclosing any error the judgment of the lower court is affirmed with costs.

Affirmed.

MONDAY, November 12th, A. D. 1917.

* * * * * * *

No. 3025, October Term, 1917.

THE WASHINGTON POST COMPANY, Appellant,

vs.

JOHN A. CHALONER.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed with costs.

Per MR. CHIEF JUSTICE SMYTH.

November 12, 1917.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 57 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Washington Post Company, Appellant, vs. John A. Chaloner, No. 3025, October Term, 1917, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 7th day of December A. D. 1917.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Washington Post Company is appellant, and John A. Chaloner is appellee, No. 3025, which suit was removed into the said Court of Appeals by virtue of an appeal from the Supreme Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States, do hereby command
60 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the nineteenth day of January, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

61 [Endorsed:] File No. 25,258. Supreme Court of the United States, No. 791, October Term, 1917. The Washington Post Company vs. John Armstrong Chaloner. Writ of certiorari. Court of Appeals, District of Columbia. Filed Feb. 5, 1918. Henry W. Hodges, Clerk.

62 In the Court of Appeals of the District of Columbia.

No. 3025.

WASHINGTON POST COMPANY, a Corporation, Appellant,

vs.

JOHN A. CHALONER, Appellee.

It is hereby stipulated by and between counsel for the respective parties in the above entitled cause that the record filed in the Supreme Court of the United States on the petition for certiorari, which was granted, shall constitute the return to the said writ of certiorari

which has been served upon the Clerk of the Court of Appeals of the District of Columbia.

WILTON J. LAMBERT,
Attorney for Washington Post Company.
E. F. COLLADAY,
Attorney for John A. Chaloner.

[Endorsed:] No. 3025. The Washington Post Company, Appellant, vs. John A. Chaloner. Stipulation of Counsel. Court of Appeals, District of Columbia. Filed Feb. 25, 1918. Henry W. Hodges, Clerk.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached, and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 25th day of February, A. D. 1918.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, District of Columbia, this 25th day of February, A. D. 1918.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[Endorsed:] 791/26,258.

63 [Endorsed:] File No. 26,258. Supreme Court U. S. October Term, 1917. Term No. 791. The Washington Post Co., Petitioner, vs. John Armstrong Chaloner. Writ of certiorari and return. Filed February 25, 1918.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

The Washington Post Company, a Corporation, Petitioner,
vs.
John Armstrong Chaloner, Respondent.
} No.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

On February 26, 1910, the respondent, Chaloner, sued your petitioner in the Supreme Court of the District of Columbia, alleging as his ground of complaint that the petitioner had published a libel against him. A demurrer was interposed to the declaration and sustained by Chief Justice Clabaugh, from which judgment an appeal was taken to the Court of Appeals for the District of Columbia, which reversed the judgment sustaining the demurrer, and remanded the case for trial. The case was then tried by a jury, which re-

turned a verdict for $10,000.00, upon which verdict the trial court entered judgment, which was affirmed upon appeal to the Court of Appeals for the District of Columbia. On the trial of the case, the presiding judge instructed the jury that the article complained of was libelous *per se* in that as matter of law it could only be construed as charging the plaintiff with having committed the crime of murder in either the first or second degree and was not even open to the construction of charging the lesser crime of manslaughter, so that they must return a verdict for the plaintiff, the amount to be determined according to their judgment. The publication which the Court thus pronounced as charging the odious crime of murder in one of its degrees is so brief that it may, without inconvenience, be included in this statement of the case. It was as follows:

> "John Armstrong Chaloner, brother of Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home."

At the trial of the case the trial justice stated to the jury that he felt "obliged", in view of an opinion of the Court of Appeals overruling a demurrer to the declaration, to say to the jury that the article charged Chaloner with the commission of the crime of murder in one of its degrees as a matter of law and was therefore libelous, *per se*. In other words, that when a

newspaper, even though it be in a follow-up story, uses the words "A killed B when the latter was abusing his wife who had taken refuge in A's home" the paper *ipso facto* must be convicted of having accused B falsely of the crime of murder and not be allowed to show, or the jury be permitted to say, that the language used was fairly capable of another and non-libelous interpretation.

QUESTIONS OF GENERAL IMPORTANCE.

Among others, two questions present themselves in consideration of the decision of the Court of Appeals of the District of Columbia, which are of great and general importance in the administration of the laws of the United States, especially so in their relation to the District of Columbia. They are the following:

First. Whether or not a newspaper of national circulation, published in the national capital, or a newspaper published anywhere in the United States, such as the New Orleans Picayune, the New York World, the Cincinnati Enquirer, or the San Francisco Call, or any other paper of national circulation, which may have a representative collecting news and transacting business for it in the national capital (thereby being amenable to suit in this District under the provisions of the Code as construed by the Court of Appeals), is to be held guilty of publishing a libel *per se*, and of having charged a citizen with the heinous crime of murder if it merely uses words similar in import to those hereinbefore cited, notwithstanding the fact that this above all others is the one jurisdiction in which such doctrine ought not to prevail because it is a Federal territory in which nearly all newspapers have to

keep a representative. To put it baldly, if this be the law, every time a killing occurs he who conveys the news either by parol or in writing that A has killed B thereby slanders or libels.

Second. Whether or not a newspaper which at the time of the enactment of the tragedy published in all its editions a full, complete and admittedly accurate account of the occurrence and which, sixteen days thereafter published an article as quoted above, can be denied the privilege at the trial of the issues of placing in evidence, *at least in mitigation of damages,* the previous article which had been published to its readers and which clearly stated the intent and meaning the paper intended to convey by the subsequent item.

Third. Whether or not, in an action for libel, under circumstances as set forth in the first paragraph, where the reputation of the plaintiff is not specifically assailed, but where the plaintiff is conceded the benefit of the presumption of good character, it is permissible to allow the plaintiff to place testimony before the jury in exaltation of his character as well as his reputation, especially in relation to alleged charitable acts on his part.

The declaration based on the article above set forth was filed February 26, 1910, and promptly demurred to upon the ground that the article was not libelous *per se* and was not susceptible of the construction that it charged, an unlawful homicide. The demurrer was exhaustively argued before the late Chief Justice Clabaugh, of the Supreme Court of the District of Columbia and by him sustained after a careful search of authorities.

On appeal the Court of Appeals of this District reversed this ruling in an opinion which is susceptible of two constructions:

(1) That the demurrer admitted the construction placed upon the article by the plaintiff, namely, that the words "charged the crime of murder", and therefore, admitting that construction the demurrer could not be sustained, and

(2) That the article was at least susceptible of a libelous interpretation as well as an innocent interpretation and should therefore be submitted to the jury (36 App. D. C., 231).

Upon the trial of the case upon the issues, which came on before Mr. Justice Stafford, the latter charged the jury that in view of the opinion of the Court of Appeals he was "obliged to tell" them "that the article does constitute a libel and the defendant, having published it, is liable to the plaintiff, therefore, in at least nominal damages". (R., p. 47.) And further, he charged the jury that the libel, having charged the plaintiff with committing a crime, in this case murder at least in the second degree, the law presumed that the plaintiff had been damaged without proof of any special damage.

The jury having in effect been told that the defendant had charged the plaintiff falsely with the crime of murder by the use of the words complained of, returned a verdict in the enormous sum of ten thousand dollars, upon which judgment was rendered.

On appeal it was contended that the proper construction of the former opinion of the Court of Appeals required the article to be submitted to the jury to determine whether or not it charged the plaintiff with the crime of murder, he electing to place that construction upon the words used by the allegations of his declaration. The Court of Appeals, however, disposed of this contention by holding that its first opinion had construed the article as being libelous *per se* on

consideration of the demurrer, and that it would not reconsider the question whether or not it was libelous *per se* on this appeal, even though that opinion was rendered merely on the consideration of the demurrer admitting, as it did, the libelous construction placed upon the article by the plaintiff.

The testimony showed substantially as follows:

John Armstrong Chaloner, formerly a resident of the State of New York, having become involved in difficulties regarding his mental condition in the State of New York, and having there been adjudicated insane, moved to the State of Virginia, in which jurisdiction he was adjudged *compos mentis* and took up his residence upon a country place known as Merry Mills, owned by him, a few miles distant from the City of Washington. On March fifteen, nineteen hundred and nine, Chaloner had occasion to enter his dining room in his house in Virginia where he found a neighbor, by the name of John Gillard attempting to beat his (Gillard's) wife in the presence of one or more of their children. Chaloner attempted to interfere on behalf of the wife and drew a pistol, in an effort to overcome Gillard, and while he and Gillard were wrestling together the pistol, which Chaloner held with finger upon the trigger, was discharged, Gillard being thereby killed.

On March 17, 1909, the Washington Post, together with other papers in Washington, to wit., the Washington Star and Washington Times, published complete and accurate accounts of the occurrence stating that after an investigation by a coroner's jury, Chaloner had been acquitted.

On April 3, 1909, the Washington Post published what is known as a follow-up story in the following language:

> "John Armstrong Chaloner, brother of Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home. Following the shooting Chaloner suffered a nervous breakdown, and was ordered by his physician to take a long rest. He decided to visit his old friend, Maj. Emry, who, with Chaloner, was instrumental in founding Roanoke Rapids, a manufacturing town five miles from Weldon. Chaloner arrived at Weldon after traveling all night, and was immediately hurried to Shadeland, where he received medical attention and temporary relief."

On February 26, 1910, nearly a year after the publications referred to, the original declaration in this proceeding was filed in which it was contended the follow-up article of April third charged Chaloner with the crime of murder and claimed general damages in the sum of fifty thousand dollars ($50,000).

The Court of Appeals of the District of Columbia, in its opinion reversing the decision of Chief Justice Clabaugh upon the demurrer, (36 App. D. C., 231) stated that the only question presented by the demurrer was whether the language of the publication was libelous *per se*. The Court said:

> "The demurrer admits the allegations of the declaration only in so far as it tests the actionable

quality of the words used. It therefore admits the charge of falsity, publication, and malice, and the *correctness of the innuendoes alleged*, unless they attribute a meaning to the words which is not justified by the words themselves, or by extrinsic facts with which they are connected." (p. 233.)

After proceeding to hold that the qualifying words referred to in the article were not sufficient in the opinion of the Court, as matter of law, to of themselves remove the impression attributed to them by the innuendo, the Court held that the declaration stated a cause of action and then proceeded to conclude its opinion as follows:

"We are of the opinion that the qualifying words here used are not sufficient to remove the reasonable inference that the crime of murder had been committed. Conceding, however, that the reasonable inference to be drawn from the words themselves is doubtful, the question is still one for the jury." (p. 235.)

Following this opinion the defendant filed the general issue plea of "not guilty" and a plea of truth, which latter reads as follows:

"Now comes the defendant by its attorney, leave of court to file same having been first had and obtained, and for further plea to the declaration filed in the above entitled cause says:

"(2) And for a further plea in this behalf defendant says that the said plaintiff ought not to have or maintain his aforeasid action against it, the defendant, because the said defendant says that the article and words complained of by the plaintiff in the declaration are true in substance and in fact according to the natural and ordinary signification and without the meaning imputed to them

in the several innuendoes contained in the said declaration.

"Wherefore the defendant at the time mentioned in the said declaration, published of and concerning the plaintiff the said several words in the said declaration mentioned, as it was lawful for it to do, for the cause aforesaid, and this defendant is ready to verify.

"Wherefore defendant prays judgment if the plaintiff ought to have his aforesaid action against it, etc." (R., p. 4.)

At the trial the defendant offered evidence showing that the article complained of was received in the regular way from the correspondent of the paper in Virginia and was published as any other news. It was also contended that the scope of the decision of the Court of Appeals, having been necessarily confined to the determination of the question raised on the demurrer, the defendant was entitled to have the jury, upon the evidence, determine what reasonable inference in fact was to be drawn from the words used, especially in view of the concluding paragraph of the Appellate Court's opinion, which the defendant contended so decided. Defendant also offered in evidence separately the article referred to in the Post of March 17, 1909, and the articles of about the same date which were published in the Star and Times. The trial court, however, refused to accept the view that it was for the jury to determine what inference should be placed upon the article, although it was insisted by the defendant that the article of March 17 should be treated upon the same basis as an article of retraction concerning an alleged libelous article and was clearly admissible in evidence under the general issue, in mitigation of damages if not under the scope of the additional plea

or for other purposes. The court however, refused to allow the defendant the benefit of the consideration by the jury of either the article published in defendant's paper which had been circulated wholly or at least in great part among the same readers as had the publication of April 3rd of the same year, and also refused to allow to be submitted in evidence the articles referred to in the Evening Star and Washington Times. The appellate court attempts to meet this exception by determining that the article offered being 16 days prior to the article complained of, was too remote even though it be assumed that the circulation upon the two days referred to was among substantially the same people. By the same process of reasoning a *retraction* or *correction* regarding an article which we submit is *always admissible,* would become inadmissible if it happened to be published 16 days after the article complained of.

The trial court also, in the face of objection, allowed evidence to be submitted exalting the general character and the character of the plaintiff in particular for charitable acts although no evidence was submitted by the defendant to attack the presumption of good character to which the plaintiff was entitled. The appellate court in disposing of this question takes the position that, admitting the plaintiff is entitled to the presumption of good character until attacked, the presentation of evidence accentuating such presumption by material testimony ought not to be considered error.

The trial court also, over exception, admitted evidence concerning the beaten, bloody and lacerated condition of the head and body of Gillard's wife at the time of the occurrence which, it is submitted, was not

pertinent to the issue and could have but one tendency, namely, to inflame the minds of the jury unduly against the defendant which was in no way responsible for the brutal treatment inflicted upon Mrs. Gillard.

I.

We will briefly refer to the action of the Court of Appeals in refusing to reverse this case upon the ground that the article should have been submitted to the jury for its construction, from a double aspect, (1) whether or not the prior opinion of the Court of Appeals so held, and (2) whether or not the article in fact was libelous *per se.*

It is elementary that where an alleged libel is heard upon demurrer it is for the Court "to consider the publication as a mere invention, devoid of truth, published for the purpose of scandalizing the plaintiff," and "to say whether or not, when so considered, it is defamatory and libelous." (*Doan* v. *Kelly,* 121 Ind. 413.)

The question for the court is "whether the words set out are capable of the meaning ascribed to them," and, if they are, "then it must be left to the jury to say upon proof of all the facts whether such is the true meaning or the sense in which they were understood." (*Bihler* v. *Gockley,* 18 Ill. App. 496.)

The Court of Appeals admits the propriety of this principle in the language of its first opinion hereinbefore quoted.

So well settled is the proposition that the innuendoes placing the plaintiff's interpretation upon the article complained of are *admitted by the demurrer* and binding upon both parties to the suit when a demurrer is argued that the courts have gone to the extent of sus-

taining demurrers where the construction adopted by the plaintiff does not make the article, in the opinion of the Court, libelous *per se,* although the words complained of could be susceptible of a defamatory meaning.

In the case of *Thompson* v. *Sun Publishing Company,* 91 Me. 203, the Court says:

> "Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribed to it, is in such a case a question of law for the court. What meaning the words did convey to the readers is in such a case a question of fact for the jury. It is not the intention of the writer, or the understanding of any particular reader that is to determine the question. It is rather the effect which the language complained of was fairly calculated to produce and would naturally produce upon the minds of readers of reasonable understanding, discretion and candor, after it has been examined and considered in connection with all other parts of the writing, and in the light of all the facts and circumstances known to them.
>
> "But upon demurrer to the declaration, words alleged to be libelous cannot be pronounced actionable by the court, 'unless they can be interpreted as such with at least reasonable certainty. In case of uncertainty as to the meaning of expression of which the plaintiff complains, the rule requires him to make the meaning certain by means of proper colloqium and averment.' *Wing* v. *Wing,* 66 Maine 62."

In *Mitchell* v. *Sharon,* 51 Fed. 424, the Court says:

> " . . . But in this case, even if it should be conceded that the words are susceptible of an in-

terpretation that would make them actionable *per se*, still it is manifest from the allegations of the complaint that they are susceptible of a different meaning. The plaintiff having deliberately declared what the proper construction should be,—which construction does not make the words actionable—and the words themselves, taken in connection with the entire discourse, and qualifying sentences thereof, being, as plaintiff alleges, capable of such construction, is it not the duty of the court, upon demurrer, to accept the construction which the plaintiff has given to the words? It seems clear to my mind that there is no other sensible view to take. 'Where language is ambiguous, and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out the meaning which plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. . . . When the plaintiff, by his innuendo, puts a meaning on the language published, he is bound by it, although that course may destroy his right to maintain the action.' Townsh. Sland. & L., Sec. 338; Starkie, Sland. & L., Sec. 565."

In *Herrick* v. *Tribune Company*, 108 Ill. App. 244, the Court says:

"Counsel urged that the innuendoes can be treated as surplusage and the counts sustained by disregarding them. Whatever as to certain words may be done after verdict, upon the demurrer in this case, the innuendoes could be treated as surplusage. They contain the meaning attached to the words by the plaintiff and charged by her as the significance they have. Neither upon demurrer was she, nor upon trial would she have been at liberty to reject that meaning and resort to an-

other. *Strater* v. *Snyder,* 67 Ill. 404; Townshend on Slander and Libel, Sec. 338."

In the case of *Feder* v. *Herrick,* 43 N. J. Law, 24, it is said:

> " . . . The effect of these two principles of judgment is, that if the plaintiffs have ascribed to the words in question a meaning that involves any such aspersion of the character of the plaintiffs as would naturally have the effect of exposing them to social ridicule, contempt, hatred, or to similar degredations, it must be admitted that an actionable offense is manifested. (Page 26.) See also *Smith* v. *Tribune Co.,* Fed. Cas. No. 113, 118.)"

In order to hold that the words used were libelous *per se,* it was incumbent upon the Court to decide that all reasonable minds would necessarily reach the conclusion that the charge of killing Gillard, with the qualifying words, "while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home" charged the plaintiff with the crime of murder in one of its degrees. It is difficult to believe that the average reader of a newspaper would necessarily reach that conclusion, especially when this excerpt from the article is read in connection with the whole news item. This Court has already held, as herein contended, by affirming that part of the decision of the Court of Appeals in *Warner* v. *Baker,* 36 App. D. C. 493, (231 U. S. pp. 593-4), that "It is for the jury and not for the court to determine the meaning of ambiguous language in the published article."

In the following cases the words quoted were held to be susceptible of two meanings, one innocent and the other defamatory, and therefore should be submitted to the jury:

Hays v. *Hays*, 1 Humphr. 402, where the language used was "You have killed a negro and nearly killed another";

Smith v. *Commercial Publishing Co.*, 149 Fed. (C. C. A., 704) where the article was as follows:

"MURDERER ARRESTED.

"Sheriff Marshall Patterson arrested Smith, camped in a tent two miles north of Augusta, on White River. Smith is wanted at Kennett, Mo., for killing old man F. E. Porch, the incentive being robbery. The State of Missouri offered $300, the County $200, and the citizens of Malden $600 for Smith's arrest. Smith does not deny being the man wanted, but claims he did not do the killing."

In holding that the publication must be read and construed as a whole, Mr. Justice Lurton, who delivered the opinion of the Court, says:

" . . . When thus read, if its meaning is so unambiguous as reasonably to bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, on the other hand, it is capable of two meanings, one of which would be libelous and actionable, and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including the extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed, or by whom it may be read." (Numerous citations.)

When we look to the extraneous facts admitted in evidence in this case, we find that Gillard, a man of powerful physique, was beating his wife over the head

with a pair of heavy tongs, used for handling logs or blocks of wood for the fireplace, made of iron, with a heavy brass handle. (Rec., p. 11, 21.) He was going to kill her, had raised his tongs and was about to deliver what would have been a knock-out blow; her hair was streaming all over her face, and being interfered with in his attempts to kill her by the plaintiff and the witness Money, Gillard, at the time the shot was fired, had seized the barrel of the pistol, which the plaintiff had drawn and was holding in his hand, and was pointing it towards his wife with the intention, unmistakably, to kill her in that way, since he had been defeated in his effort to kill her with the tongs. With those circumstances before the jury could it be said that the killing of Gillard himself, by the plaintiff or anyone else, to prevent his accomplishing the crime he was attempting to commit, would not have been justifiable homicide? Homicide committed for the prevention of a forceful and atrocious crime, is justified both by the law of nature and the law of England (4 Blackstone Commentaries, 180).

It has been well said, in referring to this question, "It is not enough that the party to whom the remark is addressed may jump to the conclusion, from the language used, that a crime is being imputed to the person to whom the speaker refers. The statement must not only be such as may possibly convey to the auditor the impression that the crime in question is being charged, but must be couched in such language as might reasonably be expected to convey that meaning to anyone who happened to hear the utterance." (*Whitley* v. *Newman*, 70 S. E. 686, 689.)

Were the opinion of the Court of Appeals in this case permitted to stand, then all national newspapers

having their publication or circulation in the District of Columbia would be repeatedly subjected to actions for libel whenever they referred to tragedies, and because the law is thus fixed by the Court of Appeals, would be mulcted in damages although their purpose be absolutely innocent and the words used such as that the average reader could not believe that the crime of murder was charged. Hardly a day passes but what every newspaper in circulation in the District of Columbia and elsewhere refers to the fact that a man has shot and killed another. Under the ruling of the Court of Appeals, should that person sue the newspaper for libel the burden would be cast upon the newspaper to prove, by a preponderance of the evidence, that the plaintiff in fact committed the crime of murder in one of its degrees, although the circumstances of the killing were such as that, when shown, would be sufficient to establish that he committed either justifiable or excusable homicide or the crime of manslaughter, for the plaintiff could content himself with the introduction of the article itself and the conclusive presumption of law that has been established by the opinion in that case, that the article charged him with the crime of murder. It irresistably follows that this question is of great and general importance, and if left as it now stands, would induce a flood of litigation which would absolutely foreclose all newspapers published in this country which have a circulation in the national capital, from in any way referring to a tragedy unless it were prepared to establish that the party referred to was guilty of unlawful homicide with malice aforethought, either with or without premeditation, although that party, in fact, has been guilty of manslaughter, or had committed a justifiable or excusable homicide.

Other questions decided by the Court of Appeals involve important questions of evidence that should be disposed of once and for all by this Court, and which end could be obtained when the primary question of public importance hereinabove treated of has been passed upon.

II.

Immediately following the tragedy at Merry Mills, all of the newspapers, including the defendant's, published in detail the facts which were substantially the same as were contended for by the plaintiff in his testimony. The plaintiff elected, in connection with his claim for damages, to rely upon the presumption of injury from the publication of the libel, and not having introduced any evidence as to the extent or quantity of the circulation of the defendants paper, upon the presumption that the article was read by the subscribers to the Washington Post. It follows, therefore, that the same presumption must be indulged in that the edition of The Post containing the article complained of was read by the same subscribers of The Post, and by the subscribers of the other newspapers.

If, as it has been held, it is open to the defendant to go to the jury on the theory that the words, if ambiguous, were not used in a defamatory or libelous sense and that "under the circumstances attending the publication, its readers could not reasonably have so understood them, the issue thus raised is one of fact, not of law," (*Morse* v. *Printing Company*, 124 Ia., 707, 714), then it is difficult to understand why these preceding publications should not be placed before the jury.

> "Where the language used has reference to or is connected with, any other thing or event which

affects its meaning, it must be construed in relation to such thing or event." (*Sheibley* v. *Washington*, 130 Iowa, 195, 200-1.)

"It is also settled by our adjudications that the surrounding circumstances may be shown, and the occasion in which the words are used put before the jury, for the purpose of showing that the words could not have been understood as imputing a crime." (*Line* v. *Spies*, 192 Mich., 484.)

This question was squarely decided by Chief Justice Mansfield in *Rex* v. *Horne*, Cowper, 622, 627, which was an indictment for libel in publishing on June 8, 1775, "of and concerning His Majesty's government and the employment of his troops", that the Americans who had fallen at Lexington and Concord "preferring death to slavery, were, for that reason only, inhumanly murdered by the King's troops." Lord Mansfield held admissible in defense a copy of the Public Advertiser, of May 31, 1775, although the defendant's libel had not been published in that paper, but which contained an account of the engagements at Lexington and Concord, for the purpose of showing "That at the time there existed a public account in the newspapers, which might be of use to restrain or qualify the meaning of the paper in question." This principle, we submit, sustains the exception to the action of the court below in excluding the Times and Star articles. *A fortiori*, the article in the Post, the same newspaper in which the article complained of was published, and necessarily to a large extent if not altogether circulated among the same subscribers, should have been admitted.

In *Pfister* v. *Press Co.*, 139 Wisc. 627, 641, the defendant had offered to show that the matter of the alleged libel had been the subject of public investiga-

tion, had occupied a large amount of space in newspapers at the time, and had been a matter of general public discussion. Held, that, if this had been the case, the newspaper articles tendered under the offer should have been admitted; the judgment being affirmed upon the ground that the articles, upon examination, failed to support the tender. See, also, *McCormack* v. *Sweeney*, 40 N. E., 114; *Taylor* v. *Bond*, 88 N. E., 311.

Since the jury are led to estimate the damage by judging generally, without proof, as to the extent to which the publication was read, upon what theory are they to be denied the opportunity to judge in like manner as to how many of its readers had been reached, only a few days before, by an article in the same paper, in *pari materia*, and which tended to prevent any who had read it from understanding the publication complained of in a libelous sense?

> "The actual damages are to be determined by the jury, in the exercise of a sound discretion, upon a careful consideration of the offense or misconduct imputed to the plaintiff, the circumstances of the publication, and the extent of its circulation, and the natural and necessary consequences of such a publication, according to the results of human observation and experience." *Fry* v. *Bennett*, 3 Bosw. 200, 246; affirmed in 28 N. Y. 324.

The trial court (R., p. 47) instructed the jury that "the defendant has a right to have you consider the circumstances, if in any degree they tend to mitigate the damages." This charge, however, was without benefit to the petitioner, when the mitigating circumstances had not been permitted to be shown.

III.

As a part of his case in chief, the plaintiff was permitted to offer the testimony of the witness Dabney, that his reputation in the community for peace and good order was "excellent", and that his social standing was "that of a high-toned honorable gentleman in that community". (Rec., p. 9.) Another witness, Thurman, under objection and exception, was allowed to testify that plaintiff had "an honoroable, upright reputation among his neighbors, considered as a man of first class character, a man of broad charities".

It is elementary that in actions for libel and slander where the defendant pleads the general issue or justification, or both, the plaintiff cannot give evidence in support of his character until the defendant has attacked it by evidence, the plaintiff being entitled to the presumption that his character is good until impeached. (*Cornwall* v. *Richardson*, 21 E. C. L. 758; *Kovacs* v. *Mayoras*, 175 Mich. 582; *Hitchcock* v. *Moore*, 70 Mich. 112; *M'Cabe, et ux.* v. *Platter*, 6 Blackf. (Ind.), 405; *Dame* v. *Kennedy, et ux.*, 25 N. H. 318, 324; *Cooper* v. *Phipps*, 24 Oregon, 357, 362; *Chubb* v. *Gsell*, 34 Pa. St. 114; *Tibbs* v. *Brown*, 2 Grant (Pa.), 39; *Martin* v. *Hooker*, 7 Coldw. 130; *Young* v. *Sheppard*, 40 S. W. 62 (Tex.); *Wright* v. *Schroeder*, 2 Curt. 548.)

It was contended by the plaintiff in the appellate court that the nature of the action puts the plaintiff's character in issue, and that, if this were not so, proof of a fact which the law presumes is not injurious and therefore not reversible error. These grounds are erroneous for the following reasons:

(a) The action does not put in issue the plaintiff's character—the allegation of the declaration that the plaintiff is of good fame, etc., is merely inducement,

not traversable (*Foot* v. *Tracy*, 1st Johns, 51, Kent, C. J.) and it is only in mitigation of damages, not as a defense to the issue, that the defendant is to be allowed to give evidence as to the plaintiff's character;

(b) The error is not cured by its supposed harmlessness, for the reason that it gives undue prominence to a fact not in issue and the *ex parte* laudation of the plaintiff by his friends and admirers naturally tends to prejudice the jury in his favor and inflame their feelings against the defendant; and

(c) That, as laid down in *Harding* v. *Brooks*, 5 Pick. 247, one of the respondent's citations below, evidence of plaintiff's character is inadmissible until attacked, not only as being unnecessary, but as tending inconveniently, to procrastinate trials, etc.

(d) Harmlessness, as an answer to an exception to error, has not been and it is submitted neither ought nor can be held applicable to an error bearing, not merely upon the particular controversy in which it occurred, but upon the trial of all other actions of the same or analogous character. This case is the first in this jurisdiction, which changes the general rule heretofore always enforced, that in actions of slander and libel, the plaintiff may not introduce evidence of his general reputation of character unless or until the adverse party has introduced evidence attacking it. If permitted to pass unreversed, then in all future actions of slander, libel, malicious prosecution, false arrest, or the like, a new and wide line of proofs and controversy is introduced, adding to the expense and labor of their trial and increasing the time of the court consumed therein and otherwise hurtful.

Petitioner is advised that the questions involved in the decision of the Court of Appeals as hereinbefore in-

dicated, are of great and general importance in the administration of the laws of the United States, especially so in their relation to the District of Columbia, and petitioner prays that a writ of certiorari issue out of and under the seal of this honorable Court, directed to the Court of Appeals of the District of Columbia, requiring said Court to certify and render to this Court, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in the Court of Appeals in the case therein entitled "The Washington Post Company, a corporation, appellant, versus John Armstrong Chaloner, No. 3025", to the end that the said cause may be reviewed and determined by this Court as provided by law, and your petitioner will ever pray.

WASHINGTON POST COMPANY,
By EDWARD B. MCLEAN,
President.

WILTON J. LAMBERT,
JOSEPH W. BAILEY,
FRANCIS T. HOMER,
RUDOLPH H. YEATMAN,
Attorneys for Petitioner.

District of Columbia, ss:

I, Edward B. McLean, on oath say that I am President of the petitioner, The Washington Post Company, and am authorized to and do make this verification on behalf of the said company; that I have read over the foregoing petition subscribed by me on behalf of said company and know the contents thereof; that the allegations therein set forth of personal knowledge are true, and those set forth upon information and belief, I believe to be true.

EDWARD B. MCLEAN.

Subscribed and sworn to before me this 14th day of December, 1917.

W. K. NOTTINGHAM,
Notary Public, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. ——

THE WASHINGTON POST COMPANY,
a Corporation, *Petitioner*,

vs.

JOHN A. CHALONER, *Respondent*.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

For answer to the Petition for Writ of Certiorari filed herein, your Respondent respectfully states:

The Record presents no question which has not been previously decided and foreclosed.

STATEMENT OF FACTS.

On April 3, 1909, Petitioner (hereinafter referred to as defendant) published in its morning newspaper, "The Washington Post," the article complained of (R. 2); and, on February 26, 1910, Respondent (hereinafter called plaintiff) brought in the Supreme Court of the

District of Columbia his action against defendant for libel, claiming damages in the sum of $50,000.00. Defendant interposed a demurrer to the declaration, which was sustained and judgment for defendant entered thereon. Plaintiff, declining to amend, prosecuted an appeal to the Court of Appeals for the District of Columbia; the judgment of the lower court was reversed; and the case was remanded for trial. (See case of *Chaloner vs. Washington Post Company*, 36 App. D. C., 231; 39 W. L. R., 41.)

As pointed out by the Court of Appeals in its decision on the appeal from the judgment on demurrer, plaintiff expressly limited himself to pleading in his declaration that the article complained of charged plaintiff with the commission of the crime of murder.

On February 14, 1911, defendant, to the declaration thus limited in scope, pleaded the general issue; and, on February 18, 1916, by leave of court, acting deliberately and, we may assume, advisedly, filed an additional special plea alleging that "the article and words complained of * * * are true in substance and in fact according to the natural and ordinary signification and without the meaning imputed to them in the several inuendoes." (R. 4.)

Upon the issues thus raised, plaintiff proceeded with his affirmative case by showing: (1) the publication of the libel; (2) by uncontradicted testimony, his standing, condition in life, and general reputation; and (3) the untruth of the statement published by the defendant, namely, that "he shot and killed John Gillard while the latter was abusing his wife."

I.

THIS IS NOT A CASE OF PECULIAR GRAVITY AND GENERAL IMPORTANCE.

This Honorable Court has repeatedly and uniformly denied petitions for writs of certiorari, except "in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

Re Law Ow Bew, 141 U. S., 583.
Same case, 144 U. S., 47.
Re Wood, 143 U. S., 202.
American Construction Co. v. *Jacksonville Ry. Co.*, 148 U. S., 372.

The question of the admission of evidence of the plaintiff's standing, condition in life, and reputation is foreclosed by this Honorable Court in denying the petition for writ of certiorari in each of the following cases:

Press Publishing Company vs. McDonald, No. 1012, denied May 25, 1896, 163 U. S., 700.
New York Evening Journal Publishing Company vs. Joseph Simon, No. 441, denied October 15, 1906, 203 U. S., 589.

And the question as to the actionable quality of the words is likewise foreclosed by the denial of the petition for writ of certiorari in the case of *Morgan* v. *Halberstadt*, No. 1198, denied May 14, 1894, 154 U. S., 511.

Plaintiff having thus made out his case, it was incumbent upon the defendant to refute the same by proof of the allegations contained in its two pleas. It contented itself, however, with: (1) pointing out what it considered conflicting statements in the testimony offered by plaintiff; and (2) offering in evidence articles

appearing in its own and two other Washington daily newspapers *16 clear days prior* to the article sued on. (R. 30-34, 36, 37, 42.)

It is also clear from the Record that counsel for the defendant *abandoned* the special plea of justification and offered, under the general issue, *all* of said *prior* publications on the question of malice and in mitigation of damages. (R. 43.) And, notwithstanding all of the prior articles so offered were wholly unconnected, by reference therein or otherwise, with the article sued on, and were published March 17th, sixteen days before April 3d, when the article sued on was published, defendant has the temerity to insist here that those articles of March 17th should have been admitted under the general issue in mitigation of damages!

This is far from being a case of peculiar gravity and general importance. It is an action for libel, and concerns only the plaintiff and defendant. There is nothing to distinguish it from many other cases heard by the same court. No question of public interest or importance is involved; the only issue was whether the plaintiff had been libeled; and, if so, what damages should he recover? The court and jury have settled those questions, and without affecting public rights in any way. The highest court of the District in which the suit was brought affirmed the judgment.

II.

NEITHER IS THIS A CASE REQUIRING REVIEW BY THIS HONORABLE COURT TO SECURE UNIFORMITY OF DECISION.

The only other ground upon which defendant's petition may be considered is by showing that a review of

the decision of the Court of Appeals for the District of Columbia is necessary to secure uniformity of decision.

But defendant's petition does not show that any conflict exists. On the contrary, it clearly appears that the rulings of the court are based upon prior decisions in similar cases and are in accordance therewith.

We do not deem it necessary, upon this application, to discuss in detail the various alleged errors set out in defendant's petition and so elaborately supported by argument. They were all considered by the court below (some of them on two appeals), and decided adversely to defendant's contention.

The Circuit Courts of Appeals and the Court of Appeals for the District of Columbia were created to relieve this Honorable Court of unfounded appeals; and, as clearly appears from the cases already cited, it is only where a petitioner plainly shows that his case is one well-founded, in that it is of peculiar gravity and importance, or is in conflict with other decisions, that this Honorable Court will review the case upon a writ of certiorari.

We respectfully submit that the petition for a writ of certiorari to the Court of Appeals for the District of Columbia should be denied.

Respectfully submitted,

EDWARD F. COLLADAY,
JOHN RIDOUT,
H. S. BARGER,
Attorneys for Respondent.

TOPICAL INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

THE WASHINGTON POST COMPANY, *Petitioner,*
vs.
JOHN ARMSTRONG CHALONER.

BRIEF FOR PETITIONER.

This case comes before this court for the purpose of reviewing the judgment of the Court of Appeals of the District of Columbia affirming a judgment of the Supreme Court of the District of Columbia in favor of John Armstrong Chaloner, the plaintiff in the trial court, in the sum of $10,000 as damages alleged to have been sustained by him as a result of the publication of an article in the newspaper published by the petitioner, defendant below, known as The Washington Post.

The record of the proceedings in the trial court and in the Court of Appeals of the District of Columbia was certified to this court in response to a writ of certiorari granted upon the application of the Washington Post Company averring that the questions involved in the decision of the Court of Appeals were of great and general importance in the administration of the laws of the United States, and especially so in relation to the District of Columbia.

For the purposes of convenience we shall hereinafter

refer to the respondent, John A. Chaloner, as plaintiff, and the petitioner, as defendant.

Statement of Case.

On March 15, 1909, one John Gillard lost his life by a shot from a pistol in the hands of the plaintiff, in the latter's residence or dwelling house upon his estate known as Merry Mills, in Albemarle County, Virginia. On March 17, 1909, the defendant had published an account of the occurrence (R., pp. 31-4), which over defendant's objection and exception the Court excluded from the consideration of the jury (R., pp. 34-5), in the course of which account Gillard's brutality to his wife, an attempt to prevent which was the immediate cause of the tragedy, was described, and in which the shooting was stated to have occurred when plaintiff and one Money were endeavoring to rescue Gillard's wife upon whose head he was raining blows with a pair of tongs, plaintiff having armed himself with a pistol, which, after apparently having been gotten under control, Gillard succeeded in grasping and pointing toward his wife, resulting in a shot by which Gillard was killed, the article further setting forth plaintiff's declaration that he had had no intention of firing on Gillard but had intended merely to intimidate him, and the further fact that the coroner's jury returned a verdict that Gillard came to his death by an accidental discharge of a revolver in the hands of himself and plaintiff and while the latter was in good faith attempting to keep Gillard from shooting his wife (R., pp. 33-4).

Similar accounts were also published on March 17th, in the *Washington Times* (R., pp. 36-7), and the *Evening Star* (R., pp. 38-42), both profusely illustrated, the former containing the following:

"Virginians Glad Chanler is Freed.

"Jury Verdict Exonerating Him in Gillard Killing Generally Approved.

"Charlottesville, Va., March 17.—Virginians in this section today are relieved that the jury empaneled by Coroner Williams has exonerated John Armstrong Chanler (Chaloner), who yesterday shot to death John Gillard, wife-beater and soldier of fortune." (R., p. 36.)

These three publications of March 17th, namely, that in the *Post*, in the *Times* and the *Star*, were severally offered in evidence by the defendant and rejected by the Court, subject to its objection and exception (R., pp. 37-42).

On April 3, 1909, the defendant received from its Richmond correspondent, and published, what is called in newspaper phraseology "a special," or "follow-up" story, which is the publication sued upon (R., p. 9), and which, with the innuendo placed thereupon by the plaintiff is set out in his declaration as follows:

"John Armstrong Chaloner (Chanler) (meaning the plaintiff), brother to Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home. Following the shooting, Chaloner suffered a nervous breakdown, and was ordered by his physician to take a long rest. He decided to visit his old friend, Maj. Emry, who, with Chaloner, was instrumental in founding Roanoke Rapids, a manufacturing town 5 miles from Weldon. Chaloner arrived at Weldon after traveling all night and was immediately hurried to Shadeland, where he received medical attention and temporary relief. The said defendant meaning and intending by said false, scandalous and malicious

libel to charge the plaintiff with the crime of murder in the killing of one John Gillard, when, on the contrary, the fact was as defendant well knew, that while the plaintiff was engaged in a most laudable effort to prevent the said Gillard from murdering his wife, and although the said plaintiff purposely refrained from shooting said Gillard as plaintiff was well justified in doing, the said Gillard was in fact killed by accidental explosion of a pistol which the said Gillard was endeavoring to wrest from the grasp of plaintiff in order that the said Gillard might, with the said pistol, murder his wife, so that in truth and fact as the defendant well knew, plaintiff was entitled to the highest credit for his courage and chivalrous conduct in the premises." (R., pp. 2, 3.)

Upon the filing of the declaration, the defendant demurred and the demurrer was sustained, which action was, upon appeal, reversed by the Court of Appeals (36 App., D. C., 231), whose opinion in this case contains the following:

"It is contended by counsel for defendant that the publication does not charge plaintiff with the commission of the crime of murder, as alleged in the declaration. In determining whether or not the publication is libelous, we think it is not necessary that it in terms charges plaintiff with the crime of murder. It would be sufficient if the publication were such as to cause the public to reasonably infer from reading it that the plaintiff had been guilty of the commission of this crime. The unlawful killing of another may constitute murder, either in the first or second degree; and unless there is something in the publication which would clearly convey to the reader that the killing was justifiable, or the circumstances are such as to reduce the crime to manslaughter, and thus remove the impression that the plaintiff had been guilty of the crime of murder, then it must be held that the declaration states a cause of action.

To this end it is not necessary that the declaration shall charge the crime with the certainty required in an indictment. Thompson vs. Lewiston, Daily Sun Pub. Co., 91 Me., 203, 39 Atl., 556; Thompson vs. Barkley, 27 Pa., 263. It is insisted by the counsel for defendant that the statement in the publication that plaintiff "killed John Gillard, while the latter was abusing his wife," is sufficient to convey the impression that the killing was justifiable. With this contention we do not agree. To charge another with the killing of a human being, with no other words of limitation or qualification than are here used, imports the commission of the crime of murder in one of its degrees. When this is the natural deduction to be drawn from the language used, the burden is upon the defendant to show that the words used in the publication are to be interpreted in a sense different from their ordinary and natural import. Emerson vs. Miller, 115 Iowa, 315, 88 N. W., 803; Shockey vs. McCauley, 101 Md., 461, 61 Atl., 583, 4 A. & E. Ann Cas., 921. We are of the opinion that the qualifying words here used are not sufficient to remove the reasonable inference that the crime of murder had been committed. Conceding, however, that the reasonable inference to be drawn from the words themselves is doubtful, the question is still one for the jury."

Upon the cause being remanded, the defendant pleaded the general issue, and justification in that "the article and words complained of by the plaintiff in the declaration are true in substance and in fact according to the natural and ordinary signification and without the meaning imputed to them in the several innuendoes contained in the said declaration" (R., p. 4).

The trial court held the publication complained of to be libelous *per se.*, and based this ruling upon the language of

the Court of Appeals in passing upon the demurrer above quoted (R., pp. 42-3, 47).

At the trial the plaintiff gave the following version of the occurrence (R., pp. 20-27):

On March 15, 1909, the plaintiff was the owner of an estate called "Merry Mills," situate at Cobham, Albemarle County, Virginia. He had in his employ Mr. Ernle George Money, who acted as agent, John Grady, colored, who was his body servant and cook, and several families who worked upon his place. Prior to that time he had become acquainted with one John Gillard and his wife and children. A few days before March 15th, plaintiff, in conversation with Joseph W. Sampson, an old friend, requested Sampson to see the Honorable A. D. Dabney, and to advise him that Gillard was a wife-beater and that Mrs. Gillard had suffered from wounds inflicted by a poker or other instrument on three occasions. Plaintiff suggested that Sampson further advise Judge Dabney that the next time Gillard beat his wife she should flee to plaintiff's home, as he had ample room in the houses of two of his farm hands who were married, to accomodate them.

On March 15, 1909, Mrs. Gillard did come to Merry Mills, about two o'clock in the afternoon, and she and her children were shown into the dining room. Plaintiff was upstairs at the time and was notified of their presence by his body servant. He dressed himself, and while passing the head of the stairs on the second floor bound for an office where Colonel Money was engaged, he heard low tones of a voice below which he believed to be that of Gillard. While plaintiff descended the steps he suddenly heard moans of a woman and cries of children, accompanied by a crushing sound. Entering the dining room he found George Gillard, one of the children, with a welt on his forehead, and Mrs. Gillard kneeling near the chimney, sheltering an

infant in her arms against the wood box. Gillard was was standing back of her with a pair of heavy, old-fashioned Colonial tongs raised. Plaintiff caught Gillard by the scruff of the neck and pulled him away. A scuffle and fight ensued in which Money participated, who finally succeeded in hugging Gillard from behind with his head on the latter's shoulder, cheek by jowl. John Grady also assisted in the effort to subdue Gillard, seizing his wrists and holding them. When Gillard's arms were pinned from behind by Money, plaintiff drew a pistol out of his hip pocket, a self-cocking .32 Smith & Wesson. Plaintiff covered Gillard with the revolver and had Grady find a rope with which to tie him. Money continued to hold Gillard. When Grady left the room, Gilard pushed Money from the small sideboard against which he had been leaning and a struggle began, in which the two worked their way toward the door. Plaintiff after first covering Gillard with the revolver had pointed it toward the ground, while interestedly watching the two men struggle. His interest got the better of him and he unintentionally stepped close to Gillard, who suddenly seized plaintiff's right hand with his left hand and swung the pistol around so that it pointed at Mrs. Gillard. Plaintiff swung it straight back instantly, and put his finger on the trigger. In this struggle the pistol was fired and Gillard was shot through the head, dying instantly."

Grady, called as a witness by the plaintiff, testified that "the barrel was toward Gillard" (R. p., 14), and that "Mr. Chaloner had the pistol in his hand pointed at Gillard, was standing in front of Gillard, standing still" (R., p. 14).

Assignments of Error.

The assignments of error, seventeen in number, are set forth at pages 6 and 7 of the record, and may be reduced for

present purposes to the propositions that the trial court erred in the particulars following:

I. In refusing to grant defendant's motion for a directed verdict (Assignment of Error 13).

II. In holding the publication libelous, *per se*, and refusing to allow the jury to pass upon its meaning. (Assignments of Error 14 and 15).

III. In excluding previous news items relative to the occurrence at Merry Mills. (Assignments of Error 6, 7, 8 and 10).

IV. In refusing to allow the jury to pass upon the truth of the publication as pleaded, and to find the defendant not guilty if found true. (Assignment of Error 15).

V. In the erroneous admission of testimony tending to excite, inflame and enlist the sympathies of the jury, and to the allowance of exaggerated damages. (Assignments of Error 1, 2, 3 and 11).

ARGUMENT.

I.

A VERDICT FOR THE DEFENDANT SHOULD HAVE BEEN DIRECTED BY THE TRIAL COURT.

At the conclusion of all of the evidence offered in the case the defendant moved the Court to direct a verdict in its favor on the ground that the article complained of was not susceptible of the meaning attempted to be attributed to it (R., p. 44). The action of the trial Court in refusing to grant this motion is the basis of Assignment of Error 13, and the first and fundamental proposition to be considered.

The defendant earnestly contends that this is not a proper case for submission to the jury for the reasons (1) that the article complained of is not libelous *per se;* (2) that it is

not susceptible of a construction that it charges the plaintiff with the crime of murder, and therefore cannot be found to be libelous by a jury; and (3) no extraneous evidence was introduced that would supply this defect in the pliantiff's case and make it possible to be construed as libelous.

The plaintiff when he filed his declaration in this case elected to place his own construction upon the language of the article and did so by alleging that the defendant intended "to charge the plaintiff with the crime of murder in the killing of one John Gillard * * *" (R., p. 3). Is he bound by that election?

An innuendo is "a statement by the plaintiff of the construction which he puts upon the words himself, and which he will endeavor to induce the jury to adopt at the trial" (Newell, S. & L., 3 Ed., Sec. 751).

A plaintiff "will not be allowed in the middle of the trial to start a fresh innuendo not in the pleadings; he must abide by the construction put on the words in his statement or else rely on their natural and obvious import. He cannot during the trial set up a third construction of the words differing both from their *prima facie* meaning and from that pointed out by the innuendo" (Ib., Sec. 756).

"The defendant is in no way embarrassed by the presence of an innuendo in the statement of a claim; in fact, it is to him an advantage. He can either deny that he spoke the words, *or he can admit that he spoke them, but deny that they conveyed that meaning.* He can also plead that the words were true either with or without the alleged meaning. It will then be for the jury to say from the proofs whether or not the plaintiff's innuendo is sustained" (Ib., Sec. 755).

It follows, that in order to carry this case to the jury it was incumbent upon the plaintiff to show that the article complained of was susceptible of the construction that it charged the plaintiff with the commission of the crime of

murder in the killing of one John Gillard and to do so the plaintiff was driven to the necessity of claiming that the words in and of themselves as a matter of law made such a charge, or that the words in and of themselves were susceptible of such a meaning, as no extraneous evidence was offered by him which would assist him in that respect. Has the plaintiff met this burden?

Murder at common law is described by Sir Edward Coke to be:

> "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied" (3 Inst., 47).

This description underlies the two sections of the Code of the District of Columbia defining murder in the first and second degrees, the differences between which it is not necessary for the purposes of this case to point out.

We are sensible of the rule of law that in order to constitute a publication a libel, it is not necessary that the words used charge, with the strictness of averment necessary in the framing of an indictment, an offense against the law of the land; but it is certainly reasonable to expect to find in an article which it is alleged tends to characterize the actions of a complainant as constituting the crime of murder some word or words indicating or imputing an unlawful killing or a homicide with malice aforethought, either express or implied. In other words, it can not seriously be said that the mere writing that in an altercation a man has killed another, is libelous, as tending to charge one with the murder of another, as that in itself does not necessarily mean that the slayer was guilty of an unlawful or improper act, for he may have been justified for many reasons or the death may have been caused accidently. This is, to a degree,

illustrated by the case at bar, as while the publication sets forth that plaintiff shot and killed Gillard while the latter was abusing his wife, that statement is not inconsistent with the allegations of the declaration, as well as the evidence, to wit, that Gillard was, in fact, killed by accidental explosion of a pistol which he was endeavoring to wrest from the grasp of plaintiff. Therefore, viewing the publication in the case at bar, which in substance announces that plaintiff was recuperating from a nervous breakdown as a result of a tragedy at his home, "when he shot and killed John Gillard, *while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home,*" wherein can it be said that plaintiff was charged with unlawfully and with malice aforethought, either express or implied, killing another, or that such an act was imputed to him? The publication proclaims to its readers that plaintiff shot and killed one Gillard "while the latter was abusing his wife, who had taken refuge at Merry Mills," plaintiff's home; it contains no averment, suggestion or inference that such action of plaintiff was unnecessary, unjustified, unwarranted, or not accidental, under the existing conditions, and as a whole, considered in its ordinary meaning—that meaning which the average reader would give to it—we respectfully submit that it not only does not impute to plaintiff the crime of murder in the killing of one John Gillard, but pictures him as performing a laudable act in endeavoring to protect and save the life of one of the weaker sex.

In the case of Brown vs. Tribune Ass'n, 77 N. Y. Supp., 461, it was held that a newspaper article referring to the suicide of plaintiff's husband, and stating "his relatives there blamed his second wife (meaning the plaintiff) who was his first wife's nurse in her fatal illness, for his suicide" were not libelous *per se*, the innuendo stating that that por-

tion of the article intended to and did accuse plaintiff of having caused the said Olive W. Brown to commit suicide.

In commenting upon the case the court says (p. 462):

> "The validity of the complaint, therefore, must be determined by the interpretation which the plaintiff herself has put upon the words published. As thus interpreted, the article charges that the plaintiff was the cause of her husband's suicide; but this in and of itself did not charge the plaintiff with the commission of any act of which she was guilty, or for which she could be justly censured, *and for the reason that she might be the innocent cause of it.* In other words, the publication of an article to the effect that a wife is the cause of her husband's suicide, without any allegation or extrinsic facts to the effect that her acts were unjustifiable, is no more than saying that she was the occasion of his suicide, which charges nothing whatever that is even censurable as against her * * * Therefore the mere allegation of the fact that the plaintiff caused her husband to commit suicide without any other facts pleaded, which tended to show that it was some guilty or unjustifiable act on her part, did not accuse her of any act which could injure her in any way. Ruell vs. Tatnell, 43 L. T. N. S., 507; Miller vs. Buckdon, 2 Bulst, 10; Peake vs. Oldham, Cowp., 275; Young vs. Cook, 144 Mass., 38. And manifestly for the reason that she might be the innocent cause of his contemnable act. Bretton vs. Anthony, 103 Mass., 37. In the case last cited the charge was that the defendant burned his store, and the innuendo was that he burned it with the intention 'to injure the insurers thereof.' But this was held bad on demurrer, inasmuch as there was no allegation to the effect that defendant's act was actuated by a bad motive; and that he might have carelessly or innocently burned the store; 'that the act of burning one's own property becomes a crime only under special circumstances, as when done for the purpose of de-

> frauding the insurers, or in violation of the provisions of the bankrupt act.' See, also, Chase vs. Bulkley, 15 Wend., 327." (Our italics).

In the case of Gallup vs. Belmont, 16 N. Y. Supp., 483, affirmed in 135 N. Y., 647, it was held that a publication that the officers of a kennel club had failed to pay prizes awarded at a bench show held by the club, and that they were consequently disqualified to exercise certain privileges pertaining to assocation of such club, does not hold up such officers to the contempt or ridicule of the community, nor impute to them any dishonest conduct in the non-payment of such prizes, and is therefore not a libel. In the course of its opinion the Court says (p. 484):

> "Now it is to be observed that there is no statement of any wrongful act on the part of the persons thus disqualified * * * The question here is not as to the actual effect of the vote of the committee, but relates to the effect on the public of the publication as to the character of plaintiff. There is nothing disgraceful in being disqualified."

> "But it is not every false and malicious charge against an individual, though reduced in writing, and published maliciously, that will sustain an action for damages. 'It must appear,' as said by Justice Vanderbaugh in Stewart vs. Minn. Trib. Co., 40 Minn., 101, 'that the plaintiff has sustained some special loss or damage following as a necessary or natural and proximate consequence of the publication; or the nature of the charge itself must be such that the Court can legally presume that the party has been injured in his reputation or business, or in his social relations, or has been subjected to public scandal, scorn, or ridicule in consequence of the publication.' And as said by Mr. Justice Mitchell in McDermott vs. Union Credit Co., 76 Minn., 84: 'Any discommendatory language used of and con-

> cerning a person is liable to do him injury, although such injury is often inappreciable in law. But nothing is better settled than such discommendatory language, whether written or spoken, is not actionable per se because not calculated to do the person of whom it is published any injury appreciable or cognizable by law. The courts have, for practical reasons and considerations of public policy, to draw the line somewhere, and this has often to be done by a gradual process of exclusion and inclusion, depending upon the particular facts of each case as it arises. In determining whether a given publication is libelous, the language thereof must be taken in its ordinary signification and construed in the light of what might reasonably have been understood therefrom by the persons who read it. The question is, How could persons of ordinary intelligence understand the language? In this view we are of opinion that the article complained of is not libeous. The matters particularly complained of impute to plaintiff neither dishonesty or corruption, nor that he connived to defraud the farmers out of thousands of dollars."
>
> Herringer vs. Ingberg, 91 Minn., 71.

The Court of Appeals of the District of Columbia when it reversed the action of the trial Court in sustaining a demurrer to the declaration on the ground that the article was not libelous, *per se*, realizing that the plaintiff had elected to take the position that the words charged him with the commission of the crime of murder when it says in its opinion that "it would be sufficient if the publication were such as to cause the public to reasonably infer from reading it that the plaintiff had been guilty of the commission of this crime [murder]" (p. 234), argues that "to charge another with the killing of a human being, with no other words of limitation or qualification than are here used, imports the commission of the crime of murder in one of its degrees" (p. 234).

Does this reasoning apply to this case. Stripping the article of the explanation that Chaloner killed Gillard "while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home," do the words, "shot and killed" admit of an interpretation that they charge not only a homicide but an unlawful homicide and such an unlawful act perpetrated with malice aforethought? That such inference must be drawn therefrom can admit of no doubt as it is necessary to infer all of these elements before the crime of murder can be inferred.

Homicide is a word derived from the Latin, *homo* and *cedere* and means "the killing any human creature." Black Com., 177. Of course, all homicides are not felonious. At common law homicide was divided into murder, manslaughter, excusable homicide and justifiable homicide. (Whart. Cr. L., 11th Ed., p. 586). While manslaughter is a felonious killing of another without malice aforethought, yet the plaintiff has elected to charge that the article conveys the meaning that the plaintiff killed Gillard not only unlawfully and feloniously but deliberately and with malice aforethought. Therefore, even if the words were susceptible of the meaning that manslaughter had been committed, the plaintiff's case could not go to the jury.

As the words used do not admit of a construction that an unlawful homicide with malice aforethought had been committed by the plaintiff, it is therefore respectively submitted that the trial Court erred in refusing to grant defendant's motion for a directed verdict.

II.

Was the Publication, as Matter of Law, Libelous Per Se?

Stated baldly and without giving any consideration to the qualifying words used in the article, the case amounts to

this: If A publishes an accurate story that B killed C, does A thereby *ipso facto* charge B with the crime of murder in one of its degrees? Must he thereby, as matter of law, be presumed to have made such a charge in so certain degree that no other construction can, as matter of law, be placed upon the language and render it necessary for a plaintiff's verdict to be directed?

The Court of Appeals, in affirming the judgment for $10,000 has not only held that the words complained of were susceptible of a libelous interpretation, but has gone further, and without reviewing a completed record, has held that the words used, as a matter of law, constituted a charge which could not be justifiable or excusable homicide, or even manslaughter, but must be murder. The trial Court felt "obliged" (R., p. 47) to so charge the jury, in view of the former opinion of the Appellate Court, although that opinion, to our minds, conclusively shows that it reversed the action of the lower court sustaining a demurrer to the declaration, solely because it held that the words were susceptible of the construction claimed and that the demurrer admitted the innuendo alleging that the words charged the plaintiff with murder.

A careful analysis of the first opinion will show that its language was used with reference to the case before the Court, namely, not whether the words were libelous *per se*, but whether they were so clearly *non-libelous, per se* or otherwise, that the Court below was correct in sustaining the demurrer to the declaration thereby finally adjudicating the case against the plaintiff. It is familiar law that the language of judicial opinions is to be read in the light of, and not extended beyond, the case before the Court.

In all cases where it is claimed that an article is libelous, the question is presented to the Court "whether the words

set out are capable of the meaning ascribed to them," and if they are, "then it must be left to the jury to say upon proof of all the facts whether such is the true meaning or sense in which they were understood." (Bihler vs. Gockley, 18 Ill. App., 496).

In reversing the action of the lower Court in sustaining the demurrer to the declaration (36 App., D. C., 231) the Appellate Court did no more than express its own view that, upon demurrer, the qualifying words relied upon were not sufficient to remove a reasonable inference that the crime of murder had been committed;—if they were, then the action of the lower Court must have been affirmed. So far from undertaking to determine that the words were libelous *per se*, in which case there would have been no question for the jury except as to the quantum of damages, the immediately succeeding sentence of the opinion of that Court was, "Conceding, however, that the reasonable inference to be drawn from the words themselves is doubtful, the question *is still* one for the jury." If the words were ambiguous, if they were open to two constructions, then under all the authorities their meaning presented an issue for determination by the jury.

It is further to be noted that, even in going thus far in its opinion, the Appellate Court pointed out the fact that the case before it was upon a demurrer, which "admits the charge of falsity, publication, and malice, and the *correctness of the innuendoes alleged*, unless they attribute a meaning to the words which is not justified by the words themselves, or by the extrinsic facts with which they are connected." (Our italics). The innuendo, thus admitted, was that defendant meant and intended "to charge the plaintiff with the crime of murder in the killing of one John Gillard" (p. 233).

Having stated, "We are of the opinion that the qualifying words here used are not sufficient to remove the reasonable inference that the crime of murder had been committed" (p. 235) the Court was forced to rely upon the rule just stated, which undoubtedly is well settled in the law, as shown by the cases following:

In the case of Thompson vs. Sun Publishing Company, 91 Me. 203, the Court says:

> "Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribed to it, is in such a case a question of law for the Court. What meaning the words did convey to the readers is in such a case a question of fact for the jury. It is not the intention of the writer, or the understanding of any particular reader that is to determine the question. It is rather the effect which the language complained of was fairly calculated to produce and would naturally produce upon the minds of readers of reasonable understanding, discretion and candor, after it has been examined and considered in connection with all other parts of the writing, and in the light of all the facts and circumstances known to them.
>
> "But upon demurrer to the declaration, words alleged to be libelous cannot be pronounced actionable by the Court, 'unless they can be interpreted as such with at least reasonable certainty. In case of uncertainty as to the meaning of expression of which the plaintiff complains, the rule requires him to make the meaning certain by means of proper colloquim and averment' (Wing vs. Wing, 66 Maine 62)."

In Mitchell vs. Sharon, 51 Fed. 424, the Court says:

> " * * * But in this case, even if it should be conceded that the words are susceptible of an in-

terpretation that would make them actionable *per se*, still it is manifest from the allegations of the complaint that they are susceptible of a different meaning. The plaintiff having deliberately declared what the proper construction should be,—which construction does not make the words actionable—and the words themselves, taken in connection with the entire discourse, and qualifying sentences thereof, being, as plaintiff alleges, capable of such construction, is it not the duty of the Court, upon demurrer, to accept the construction which the plaintiff has given to the words? It seems clear to my mind that there is no other sensible view to take. 'Where language is ambiguous, and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out the meaning which plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action * * * When the plaintiff, by his innuendo, puts a meaning on the language published, he is bound by it, although that course may destroy his right to maintain the action.' (Townsh. Sland. & L., Sec. 338; Starkie, Sland. & L., Sec. 565)."

In Herrick vs. Tribune Company, 108 Ill. App. 244, the Court says:

"Counsel urged that the innuendoes can be treated as surplusage and the counts sustained by disregarding them. Whatever as to certain words may be done after verdict, upon the demurrer in this case, the innuendoes could be treated as surplusage. They contain the meaning attached to the words by the plaintiff and charged by her as the significance they have. Neither upon demurrer was she, nor upon trial would she have been at liberty to reject that meaning and resort to another (Strater vs. Snyder, 67 Ill. 404; Townshend on Slander and Libel, Sec. 338)."

In the case of Feder vs. Herrick, 43 N. J. Law, 24, it is said:

> " * * * The effect of these two principles of judgment is, that if the plaintiffs have ascribed to the words in question a meaning that involves any such aspersion of the character of the plaintiffs as would naturally have the effect of exposing them to social ridicule, contempt, hatred, or to similar degredations, it must be admitted that an actionable offense is manifested (Page 26—See also Smith vs. Tribune Co., Fed. Cas. No. 113, 118)."

In order to hold that the words used were libelous *per se*, it was incumbent upon the Court to decide that all reasonable minds would necessarily reach the conclusion that the charge of killing Gillard, with the qualifying words, "while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home," charged the plaintiff with the crime of murder in one of its degrees. It is difficult to believe that the average reader of a newspaper would necessarily reach that conclusion, especially when this excerpt from the article is read in connection with the whole news item.

In the following cases the words quoted were held to be susceptible of two meanings, one innocent and the other defamatory, and therefore should be submitted to the jury:

Hays vs Hays, 1 Humphr. 402, where the language used was: "You have killed a negro and nearly killed another";

Smith vs. Commercial Publishing Co., 149 Fed. (C. C. A., 704) where the article was as follows:

> "MURDERER ARRESTED.
>
> "Sheriff Marshall Patterson arrested Smith, camped in a tent two miles north of Augusta, on White River. Smith is wanted at Kennett, Mo.,

> for killing old man F. E. Porch, the incentive being robbery. The State of Missouri offered $300, the County $200, and the citizens of Malden $600 for Smith's arrest. Smith does not deny being the man wanted, but claims he did not do the killing."

In holding that the publication must be read and construed as a whole, Mr. Justice Lurton, who delivered the opinion of the Court, says:

> " * * * When thus read, if its meaning is so unambiguous as reasonably to bear but one interpretation, it is for the Judge to say whether that signification is defamatory or not. If, on the other hand, it is capable of two meanings, one of which would be libelous and actionable, and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including the the extraneous facts admissable in evidence, which of the two meanings would be attributed to it by those to whom it is addessed, or by whom it may be read." (Numerous citations.)

When we look to the extraneous facts admitted in evidence in this case, we find that Gillard, a man of powerful physique, was beating his wife over the head with a pair of heavy tongs, used for handling logs or blocks of wood for the fireplace, made of iron, with heavy brass handle. (Rec., p. 11, 21.) He was going to kill her, had raised his tongs and was about to deliver what would have been a knock-out blow; her hair was streaming all over her face, and being interfered with in his attempts to kill her by the plaintiff and the witness Money, Gillard, at the time the shot was fired, had seized the barrel of the pistol, which the plaintiff had drawn and was holding in his hand, and was pointing it towards his wife with the intention, unmistakably, to kill her in that way, since he had been defeated in his effort to

kill her with the tongs. With those circumstances before the jury could it be said that the killing of Gillard himself, by the plaintiff or anyone else, to prevent his accomplishing the crime he was attempting to commit, would not have been justifiable homicide? Homicide committed for the prevention of a forceful and atrocious crime, is justified both by the law of nature and the law of England (4 Blackstone Commentaries, 180).

It has been well said, in referring to this question, "It is not enough that the party to whom the remark is addressed may jump to the conclusion, from the language used, that a crime is being imputed to the person to whom the speaker refers. The statement must not only be such as may possibly convey to the auditor the impression that the crime in question is being charged, but must be couched in such language as might reasonably be expected to convey that meaning to anyone who happened to hear the utterance" (Whitley vs. Newman, 70 S. E. 686, 689).

It is submitted that even if the Appellate Court was correct in holding that the words used were susceptible of the interpretation claimed by the plaintiff, yet it erred in holding that they were libelous *per se*.

III.

The Exclusion of Previous News Items Relative to the Occurrence at Merry Mills.

The defendant offered in evidence a publication in the Washington *Times* a few days prior to that sued upon (R., pp. 36-7), stating that the plaintiff had been exonerated in the Gillard killing by the verdict of the coroner's jury, and that the verdict was generally approved; that "he had done only what any red-blooded man would do in trying to sub-

due Gillard"; that it was established by the inquest that the shot was not fired with intention into Gillard's head; that the latter had been beating his wife with a pair of tongs, and that plaintiff, with Money, had answered the screams of the mother and children, that Gillard had tried to point a revolver, held by plaintiff, at Mrs. Gillard, who was still prostrate on the floor, and that, in the struggle, the weapon was discharged into Gillard's brain, killing him instantly—the offer being made, as stated to the Court, in mitigation of damages and as showing that in publications preceding the one complained of similar language had been used, which would necessarily affect any question as to the quantum of damages in the case, which offer was rejected by the Court, over defendant's exception.

The defendant further offered in evidence a publication in the *Evening Star* shortly prior to that sued upon (R., p. 38), stating in the headlines that the pistol had been discharged in a "Struggle with Wife Beater"; that Gillard was beating his wife over the head with a heavy pair of tongs, that he had previously threatened her life and she had gone in great fear to plaintiff's home for protection, was followed there by Gillard, who seized her by the hair and was beating her over the head with a pair of tongs, and that she was covered with blood when plaintiff and Money came to her assistance; that the testimony of plaintiff and others was that Gillard had seized the pistol and endeavored to turn it upon his wife, during which effort it exploded; that the tongs were bloody and bent from the blows; that plaintiff was never under arrest, the first investigation showing to the satisfaction of the Magistrate that he was not guilty of any crime; that the jury's investigation had borne this out, and that the jury found that the victim came to his death by the accidental discharge of a revolver in the hands

of himself and Chaloner during a scuffle, while plaintiff "was in good faith attempting to prevent Gillard from shooting his wife," and that, when the verdict was announced, plaintiff remarked, "I will be glad to have my relatives know, since I have killed a man, that the act was committed in defense of a helpless woman"; which publication was, also, excluded by the Court, under defendant's objection.

The latter, further, offered to prove a prior publication in its own columns (R., pp. 31-4), on March 17th, which stated that plaintiff had rushed to rescue a woman who was being brutally beaten with a pair of tongs, that her assailant was killed in a struggle for the pistol, that the woman embraced the men who had saved her life, that the evidence showed that Gillard, when shot, was trying to aim the weapon at his cruelly injured wife, that an inquest was held on the scene, that plaintiff was exonerated of blame, and that at the inquest no word of censure was voiced against the plaintiff; that the latter had been fired at the sight of Gillard dragging his helpless wife across the floor by the hair and belaboring her with the tongs, to which clung tufts of her hair; that the wife declared her rescuers had saved her from certain death at the hands of her husband, and that her fresh, open wounds were viewed by the jury, whose verdict was that Gillard had come to his death by the accidental discharge of a revolver in the hands of himself and plaintiff while the latter was in good faith attempting to keep the former from shooting her. The Record (pp. 34-5) shows that the Court first objected that these prior publications contained many things besides what happened at the shooting, and that, when defendant's counsel proposed to offer such portions only as referred to what had taken place in the room at the time of the killing, the Court held that the only statement of the shooting involved in the case was

the one in the article sued upon, and excluded the publication, to which exception was duly noted.

No evidence, it will be noted, was offered at the trial that any one had read the article of April 3d, nor any evidence given as to the circulation of the *Post*, or as to the territory in which it circulated. The case went before the jury solely upon the presumption that the paper had readers, and that they read the article complained of. But that article had not stood alone. It had been preceded a short time before by another and longer article, more calculated to arrest the attention and arouse interest, published in the same paper, and therefore very largely if not altogether addressed to the same readers, which article set out fully the circumstances of the killing, showed that it had occurred in an effort to prevent the murder of a helpless woman, and that the jury and the community in which it occurred had fully exonerated the plaintiff from blame. In determining the question whether or not the article sued upon conveyed to the minds of the readers a charge of murder against the plaintiff we submit that the jury were entitled to be placed in the position of the readers of the *Post*, and of the general public, at the time of the publication, and to judge of both the meaning and the effect of the article in the light of the circumstances attending its publication; and that the exclusion of the evidence necessary to enable them to do this was error, highly prejudicial to the defendant.

The objection that no evidence was offered tending to show that all who read the article of April 3d had read the previous article in the *Post*, or those in the *Times* and *Star*, is without merit. Where a retraction follows the publication of a libel, there can be no presumption that the retraction will meet the eye of all who read the libel; yet, universally, the retraction is held to be an admissable, miti-

gating circumstance, since the jury are as competent of judging of the extent to which it reached the public as of judging to what extent the libel did so.

"It is, of course, open to the defendant to go to the jury upon the theory that the words, if ambiguous, were not used in a defamatory or libelous sense, and that, *under the circumstances attending the publication*, its readers could not reasonably have so understood them, and the issue thus raised is one of fact, not of law" (Morse vs. Printing Co., 124 Ia., 707, 714).

"The question is, how would ordinary men naturally understand the language used? It is the sense in which the reader, familiar with explanatory circumstances, known to both writer and reader, would naturally understand the matter, which is controlling. * * * Where the language used has reference to, or is connected with, any other thing or event which affects its meaning, it must be construed in relation to such thing or event" (Sheibley vs. Washington, 130 Iowa, 195, 200-1).

"It is also settled by our adjudications *that the surrounding circumstances may be shown, and the occasion in which the words are used put before the jury*, for the purpose of showing that the words could not have been understood as imputing a crime" (Line vs. Spies, 192 Mich., 484).

"The principle that the decisions recognize clearly shows that the Court should have permitted the defendant *to prove the facts and circumstances in reference to which the words were used;* for these facts and circumstances may take from the words their slanderous import, and show that no crime in fact was imputed, although every circumstance to which the words related was there (Williams vs. Cawley, 18 Ala., 206-9. And see Bettner vs. Holt, 70 Cal., 270, 274-5).

An early and interesting illustration of the rule contended for, and resting upon no less authority than that of Chief

Justice Mansfield, is found in Rex vs. Horne, Cowp., 622, 627, which was an indictment for libel in publishing on June 8, 1775, "of and concerning His Majesty's government and the employment of his troops," that the Americans had fallen at Lexington and Concord "preferring death to slavery, were, for that reason only, inhumanly murdered by the King's troops." Lord Mansfield held admissible in defense a copy of the *Public Advertiser*, of May 31, 1775, although the defendant's libel had not been published in that paper, but which contained an account of the engagement at Lexington and Concord, for the purpose of showing "that at the time there existed a public account in the newspapers, which might be of use to restrain or qualify the meaning of the paper in question." This principle, we submit, sustains the exception to the action of the Court below in excluding the *Times* and *Star* articles. *A fortiori*, the article in the *Post*, the same newspaper in which the article complained of was published, and necessarily to a large extent if not altogether circulated among the same subscribers, should have been admitted.

"The Court or the jury is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language in question according to its natural and proper construction" (Townshend on Libel and Slander, Sec. 133).

In Pfister vs. Press Co., 139 Wisc., 627, 641, the defendant had offered to show that the matter of the alleged libel had been the subject of public investigation, had occupied a large amount of space in the newspapers at the time, and had been a matter of general public discussion. *Held*, That, if this had been the case, the newspaper articles tendered under the offer should have been admitted; the judgment being affirmed upon the ground that the articles, upon

examination, failed to support the tender (See, also, McCormack vs. Sweeney, 40 N. E. R., 114; Taylor vs. Bond, 88 N. E. R., 311).

All the circumstances of the publication must be considered, and that meaning taken which will give it, in the light of the circumstances, what it fairly may be presumed to have conveyed to those to whom it was published (Berea College, 77 S. W., 381).

Since the jury are led to estimate the damage by judging generally, without proof, as to the extent to which the publication was read, upon what theory are they to be denied the opportunity to judge in like manner as to how many of its readers had been reached, only a few days before, by an article in the same paper, in *pari materia*, and which tended to prevent any who had read it from understanding the publication complained of in a libelous sense?

"The actual damages are to be determined by the jury, in the exercise of a sound discretion, upon a careful consideration of the offense or misconduct imputed to the plaintiff, the circumstances of the publication, and the extent of its circulation, and the natural and necessary consequences of such a publication, according to the results of human observation and experience" (Fry vs. Bennett, 3 Bosw., 200, 246; affirmed in 28 N. Y., 324).

The trial Court (R., p. 47) instructed the jury that "the defendant has a right to have you consider the circumstances, if in any degree they tend to mitigate the damages." This charge, however, was without benefit to the defendant, when the mitigating circumstances had not been permitted to be shown.

As noted above, evidence of retraction or apology is universally admitted, not as justifying deduction from any damages actually suffered by the plaintiff, but as tending

to show that the plaintiff's damage had been reduced below that which it otherwise might have been.

"In the absence of any statutory provision upon the question, some courts have held that public apology or retraction, made after the commencement of the action, can not be proved in mitigation of damages; but the better and more liberal rule we take to be the one declared in Newell on Defamation, Slander and Libel, Section 84, that, aside from statutes, a defendant may give evidence of an apology or a retraction, in mitigation of damages, even though such apology or retraction was not made at the earliest opportunity after the commencement of the action. * * * When it is fully, promptly and adequately made, it undoubtedly tends to decrease the amount of damages which, without it, plaintiff would have sustained" (Tumer vs. Hearst, 115 Cal., 394).

Retractions are admissable "as tending to decrease the amount of damages which, without their publication, appellant would have sustained, and the same would be proper, therefore, to be considered by the jury in estimating the damages" (White vs. Sun Publishing Co., 164 Ind., 426, 428).

Retractions do not relieve from liability for the damage occasioned by the publication of the libel, except to the extent to which they repair the wrong thereby inflicted (Lehrer vs. Elmore, 100 Ky., 56; Cass vs. New Orleans Times, 27 La. Ann., 214; Dixie Fire Ins. Co. vs. Betty, 56 So. Miss., 706; Roddy vs. Gazette Co., 163 Iowa, 416).

Evidence of a previous publication, tending to prevent a construction of a later one, which could inflict a wrong or injury, we submit, is even more admissible, instead of being inadmissable at all as was held below.

The purpose of a retraction "is to eradicate so far as

possible from the minds of the persons who read the libel the false and unfavorable impressions of the plaintiff engendered thereby" (Gray vs. Times Newspaper Co., 74 Minn., 452, 458). Then why are not immediately prior publications admissable, which tend to prevent altogether the libelous or injurious construction from being placed upon the article by the readers? And, to the objection that some may have read the later article who did not read the former, the answer is that, in retractions, also, there is the like possibility that some may have read the libel who do not see the retraction, which fact, however, does not prevent the latter from being admissable. How can the jury determine how many readers of a newspaper read the retraction any more readily than how many read the prior article, which tended to prevent the injurious construction and to render a retraction unnecessary?

In Tresca vs. Maddox, 11 La. Ann., 206, the Court, holding that the injury is done by a libelous publication, that *"vox semel missa non revertit,"* that the slander, circulated by one issue of the paper, could not be wholly obliterated by its recantation in another, that all who saw the first may not have seen the last, and that it is difficult wholly to restore a reputation positively and publicly accused of a crime, held, nevertheless, that the reparation made by recanting the charges is properly to be considered by the jury in estimating the amount of damages.

That the latter articles, read in the light of the prior ones, would have tended to relieve the former of a libelous meaning in the finding of the jury, is obvious; and that the defendant may show that the words related to a known transaction, not amounting to the charge which they might otherwise import if that transaction was known and understood by the hearer or reader, is well settled and constitutes a full and complete defense, is established by many authorities.

(Jackson vs. Adams, 29 E. C. L., 371; Farmer vs. Anderson, 33 Ala., 78, 84; Norton vs. Ladd, 5 N. H., 203; Hayes vs. Ball, 72 N. Y., 418; Phillips vs. Barber, 7 Wend., 439; Barnes vs. Crawford, 115 N. C., 76; Delaney vs. Kaetel, 81 Wis., 353; Ayers vs. Greder, 15 Ill., 37).

IV.

WAS THE TRIAL COURT JUSTIFIED IN REFUSING TO ALLOW THE JURY TO PASS UPON THE TRUTH OF THE PUBLICATIONS AS PLEADED, AND TO FIND THE DEFENDANT NOT GUILTY IF FOUND TRUE?

Defendant's second plea (R., p. 4), was as follows:

> "(2) And for a further plea in this behalf defendant says that the said plaintiff ought not to have or maintain his aforesaid action against it, the defendant, because the said defendant says that the article and words complained of by the plaintiff in his declaration are true in substance and in fact according to the natural and ordinary signification and without the meaning imputed to them in the several innuendoes contained in the said declaration. Wherefore, the defendant, at the time mentioned in the said declaration, published of and concerning the plaintiff the said several words in the said declaration mentioned, as it was lawful for it to do, for the cause aforesaid, and this the defendant is ready to verify."

By the eigth and ninth instructions offered by it (R., p. 46), the defendant requested the Court to instruct the jury that if they found from the evidence that the allegations of the article were true in substance, their verdict must be for the defendant.

The plaintiff, it is true, denied that he fired the pistol which killed Gillard, and claimed that its discharge was the

accidental result of a struggle for its possession between Gillard on the one hand and himself and Money on the other, during which the former had gotten hold of the pistol, turning it so that it pointed in the direction of his wife; and, it is also true that there was no direct or positive affirmative evidence that the plaintiff did fire the shot. His testimony in that regard, however, was so contradicted by that of other witnesses in material points, and was so lacking, in many respects, in inherent reasonable probability, that whether Gillard caused the explosion of the pistol, whether it was an accident, or whether plaintiff fired it, were questions which the jury, who saw the witness, his appearance upon the stand and his manner of testifying, should have been permitted to pass upon, under the instructions which the defendant sought to have given them. The mere circumstance that one party to an action testifies to a particular fact, even where there is no affirmative evidence to the contrary, does not justify the court in taking from the jury the determination of the question whether the fact is as he testified it to be (Davis vs. Coblenz, 174 U. S., 719).

Plaintiff testified that, when Gillard was being held by Money and Grady, and when, accordingly there was no then present danger to the wife, he took his revolver out, "held it in two hands and pointed it out towards the window, and the reason was that when I talk I make gestures, and I was very much afraid that inadvertently I might point the pistol, in making a gesture like that, at Gillard, and that would mean pointing it at my friend, Colonel Money, because his face was right beside Gillard's, and Gillard was a double-headed man at that time, and John Grady looming up in the distance behind. So I had every reason in the world to keep this self-cocking revolver pointed from this man. Besides, I am afraid of fir_arms, in taking

chances. So I anchored the pistol with my left hand so I could not, no matter how unsteady I was, make a gesture and discharge it."

Why did he draw the pistol at all at that time if afraid of it? Why draw a pistol and point it out of the window? Why draw it at all, when Gillard was being firmly held by two men, and when the plaintiff knew and was thinking of his gesture-making habit, afraid that he might inadvertently point it toward Gillard, and afraid of taking chances with firearms, anyway?

At p. 26 he states that Gillard did not even have his arms raised at the time plaintiff drew his pistol; and, on that page, he states that he had the pistol pointed, not out of the window, but straight to the ground, and he did this, not because he might point it at Gillard or fire it through his gesture-making habit, but because he had on slippers, and because, if it went off, he might lose a foot. On the same page he states that, although the pistol was a self-cocker, he had "a hold on the trigger, but of course, the hammer was down"—as though that position of the hammer played any part with a self-cocking pistol. He then states that the last thing he remembers was seeing Gillard's "fingers come down on the barrel like a tarantula. I have killed tarantulas in Arizona and it moved just like that. After that he took my hand and began to squeeze it. That is all I know. The first thing I knew the pistol went off and Gillard sprang into the air and came down a dead man" (Rec., pp. 26-7). The witness Grady, on the other hand (Rec., p. 14), testifies, Mr. Chaloner had the pistol in his hand, pointed at Gillard, was standing in front of Gillard, standing still," when Grady left the room for a rope shortly before the shooting. Money's statement was that, at the time of the active shooting, he and Gillard were engaged in a struggle, the latter trying to push him through

the door leading into the dining room, edging away towards the door, and possibly getting the better of him, when all of a sudden he "heard the report of a pistol and realized that Gillard had probably been struck, because his muscles relaxed from my arms." How Gillard could, while in Money's arms and engaged in the struggle with him which the latter describes, have seized the barrel of the pistol in plaintiff's hands with his fingers coming down upon it "like a tarantula," have taken and squeezed plaintiff's hand, and had what the latter calls (Rec., p. 26) "a wrist duel" with him over its possession while pushing Money through the door and without Money's seeing or knowing anything about it, we submit is so unreasonable and improbable, in fact so impossible a story as abundantly justified defendant's request that the truth of the article should be left to the jury for determination, under the instructions asked.

V.

The Erroneous Admission of Testimony Tending Unduly to Influence the Minds of the Jury and to Aggravate the Damages.

The witness Dabney, interrogated on behalf of plaintiff as to the latter's reputation in the community for peace and good order, was permitted to testify, over the defendant's objection and exception, that it was "excellent," and that his social standing was "that of a high-toned, honorable gentleman in that community" (R., p. 9). Plaintiff's witness Thurman, under like objection and exception, was allowed to testify (R., p. 10), that he had "an honorable, upright reputation among his neighbors, considered as a man of first-class character, a man of broad charities," and that witness never heard his reputation for peace and good order questioned.

That in actions of libel and slander, where the defendant pleads the general issue or justification, or both, the plaintiff can not give evidence in support of his character until defendant has attacked it by evidence, is elementary, the presumption of law being that the plaintiff's character is good until impeached. Cornwall vs. Richardson, 21 E. C. L., 758; Kovacs vs. Mayoras, 175 Mich., 582; Hitchcock vs. Moore, 70 Mich., 112; M'Cabe, *et ux.* vs. Platter, 6 Blackf. (Ind.), 405; Dame vs. Kenney, *et ux.*, 25 N. H., 318, 324; Cooper vs. Phipps, 24 Oregon, 357, 362; Chubb vs. Gsell, 34 Pa. St., 114; Tibbs vs. Brown, 2 Grant (Pa.), 39; Martin vs. Hooker, 7 Coldw., 130; Young vs. Sheppard, 40 S. W., 62 (Tex.); Wright vs. Schroeder, 2 Curt., 548.

> "Claim is further made that the defendant in this class of cases is not injured by plaintiff introducing evidence of his good character in general, because it only tends to establish what the law would presume in the absence of objectionable evidence. The force of this latter contention would be greatly increased if the evidence of good character actually introduced tended to establish a character to the same degree of excellence that the law would presume if no evidence should be given, and if it could be certainly known the plaintiff's good character was no more forcibly presented to the minds of the jury by the favorable opinions of his neighbors, delivered under oath in their presence, than it would have been by a silent presumption of law." Blakesless vs. Hughes, 50 Ohio St., 490.

So, in the present case, contrary to the universal rule sanctioned by the authorities, and in departure from any line of testimony which the defendant, in view of them, had reason to anticipate and to prepare itself to meet, the plaintiff was placed upon a pedestal before the jury, not merely

as a man of good character and reputation, but as a "high-toned," "honorable gentleman," a benevolent man of "broad charities," and the like, tending to inflame the minds of the jury with indignation that a man of such high-toned character, noted for benevolence and wide charities and the like, should have been made the subject of a publication which, as they were instructed by the court, charged him with being a murderer. The court, in its charge, carried to their logical conclusions its rulings in the admission of the testimony of this character offered by the plaintiff, by its instructing at the close of the evidence, that (italics ours) (Rec., p. 47), "in determining what is fair compensation, you have a right, and ought, to consider the standing of the plaintiff, *his history*, his character in the community, *his reputation as shown by the evidence before you;* consider all these circumstances in determining how much he has been injured by the publication of the libel."

Further testimony of an incompetent, and we submit of an inflammatory and prejudicial nature, was that of the witness Thurman, as to the condition of the head, wounds and body of Gillard's wife. The witness was permitted to testify, over the defendant's objection and exception, that there were seven or eight wounds on her head, from two of which blood had exuded, very sensitive, tender and much swollen, and that they were inflicted with a pair of tongs two feet long, with a pair of ong tines, made of iron, and heavy (R., pp. 10, 11)—this testimony evidently being offered in the light of the allegation of plaintiff's declaration that he had been charged by the defendant with murder, when "engaged in a most laudable effort to prevent the said Gillard from murdering his wife, so that in truth and fact, as defendant then knew, plaintiff was entitled to the highest credit for his courageous and chivalrous conduct in the premises."

That these lines of attack by or on behalf of the plaintiff had the desired effect is evidenced by the fact that, with no proof whatever as to the circulation of the publication, with no evidence that a single copy of the paper was circulated in Virginia, North Carolina, New York, or in any other jurisdiction where the plaintiff was known, or that the plaintiff suffered any actual damage whatever from the publication, the jury returned a verdict against the defendant for $10,000.

Many cases were cited by the defendant in the Appellate Court in opposition to this contention, and as they will probably be renewed in response to this brief we anticipate them with the observation that the only cases which tend to support plaintiff's proposition are Bennett vs. Hyde and Adams vs. Lawson; to which may be added, as cited in other citations of plaintiff, Shroyer vs. Miller, 3 W. Va., 158—of which cases Adams vs. Lawson was libel and the other two were slander. All the other citations, when applicable at all, held, only, that testimony as to plaintiff's station or standing in life is admissible, many of them agreeing, in terms, with defendant's citations, that testimony of the plaintiff's general reputation, character and the like is inadmissible unless first attacked by the defendant.

The grounds which plaintiff's supporting authorities base their position upon are of course, worthy to be considered in determining their persuasive effect. Those grounds are that the nature of the action puts the plaintiff's character in issue, and that, if this were not so, proof of a fact which the law presumes, namely, that the plaintiff's character and reputation are good, is not injurious, and therefore not reversible error. These grounds are erroneous for the following reasons:

(a) The action does not put in issue the plaintiff's char-

acter—the allegation of the declaration that the plaintiff is of good fame, etc., is merely inducement, not traversable (Foot vs. Tracy, 1st Johns, 51, Kent, C. J.), and it is only in mitigation of damages not as a defense to the issue that the defendant is to be allowed to give evidence as to the plaintiff's character;

(b) That error is not cured by its supposed harmlessness, for the reason that it gives undue prominence to a fact not in issue and the *ex parte* laudation of the plaintiff by his friends and admirers naturally tends to prejudice the jury in his favor and inflame their feelings against the defendant; and

(c) That, as laid down in Harding vs. Brooks, 5 Pick., 247, one of plaintiff's citations, evidence of plaintiff's character is inadmissible until attacked, not only as being unnecessary, but as tending inconveniently to procrastinate trials, etc.

(d) Harmlessness, as an answer to an exception to error, has not been and it is submitted neither ought nor can be held applicable to an error bearing, not merely upon the particular controversy in which it occurred, but upon the trial of all other actions of the same or analogous character. This case is the first in this jurisdiction, since its formation, which changes the general rule heretofore always enforced, that in actions of slander and libel, in the absence of a plea of justification, the plaintiff may not introduce evidence of his general reputation or character unless or until the adverse party has introduced evidence attacking it. If permitted to pass unreversed, then in all future actions of slander, libel, malicious prosecution, false arrest, or the like, a new and wide line of proofs and controversy is introduced, adding to the expense and labor of their trial, and increasing the time of the court consumed therein.

As to plaintiff's other citations, none of them hold admissible evidence as to a plaintiff's reputation in the community, generally, or his reputation for peace and good order, which is the evidence now under consideration (Rec., p. 10).

In *Press Pub. Co. vs. McDonald*, the evidence was as to the plaintiff's "social standing"—held admissible on the authority of *Gilman vs. Lowell*, 8 *Wend.*, 579, that "persons in different stations in life will be differently damnified by the same slander," and that, therefore, the plaintiff's station in society, though not his character and reputation morally, which unattacked, is admissible. The contrary has been declared, even in New York, by the latter case of *Prescott vs. Touscy*, 50 *N. Y. Sup. Ct.*, 12, approved in *Hatfield vs. Lasher*, 81 *N. Y.*, 246—disregarded in Press Pub. Co. vs. McDonald—on the ground that, in the former case the court had reached its conclusion through a misconception of the authorities and that, in the latter, the point was *obiter*, and, also, the result of a misconception of the authorities. Apart from the novelty of disregarding the later decisions of a state court upon such grounds, it is interesting to note in this connection the authorities cited by the court in support of its views:

In *Larned vs. Buffington*, 3 *Mass.*, 546, the question was whether the trial court committed error in excluding testimony by defendant attacking plaintiff's general character for honesty, integrity and fair dealing; so that the quotation from the opinion that the plaintiff may give evidence of his rank and condition in life to aggravate the damages was purely *obiter*.

In *Klumph vs. Dunn*, 66 *Pa. St.*, 147, the evidence related only to the amount of defendant's property.

In *Harding vs. Brooks*, 5 *Pick.*, 247, admission of evi-

dence of the plaintiff's character in chief was held sustainable only because the plaintiff had pleaded justification, thus putting his character in issue.

In *Palmer vs. Hoskins*, 28 *Barb.*, 90, the only point decided was as to the admissibility of evidence as to the defendant's wealth, the matter as to which the opinion is quoted being *obiter*.

In *Eastland vs. Caldwell*, 4 *Am. Dec.*, 668, the only question was whether the defendant was entitled to attack the general moral character of the plaintiff, as distinguished from his character as involved in the libel.

In *Foot vs. Tracy*, 1 *Johns*, 51, the court (Kent, C. J.) said, in terms: "The single question in this case is whether the defendant, under the general issue, may at the trial give evidence as to the general character of the plaintiff in mitigation of damages."

With exception of the Connecticut, the Virginia and the Ohio cases noted above, none of the plaintiff's citations upholds the contention that the plaintiff, before attack, may give evidence of his "reputation in the community among his friends and neighbors and acquaintances, or the people in the community" or of "his reputation for peace and good order" (Rec., p. 10).

Enos vs. Enos, 135 *N. Y.*, 609, in no way, however remotely, refers to the question.

Larned vs. Buffington, as stated, holds, even *obiter*, that a plaintiff "may give in evidence to aggravate the damages," not his reputation or character, but his "rank and condition in life."

Morey vs. Morning Journal Assn., 123 *N. Y.*, 207, a libel charging the plaintiff with being threatened with a breach of promise suit which he and his friends were endeavoring unsuccessfully to compromise; held, only, that evidence of the business in which he was engaged was competent, not

to show special damage, none being alleged, but as bearing upon the hurtful tendency of the libel, and the general damage.

In *Post Pub. Co. vs. Peck*, 199 *Fed.*, 6, the evidence was, not as to reputation, but that the plaintiff had a wife and sister—held admissible, not that their anguish might be recovered for, but that the plaintiff's was the more severe, and that evidence of his professional standing and earning capacity in it was admissible in showing that the demands for those services had been diminished by the libel.

In *Klumph vs. Dunn*, 66 *Pa. St.*, 147, the Opinion, by Sharswood as noted, said: "It is true, as decided in Chubb vs. Gsell, 10 Carey, 115, that in an action of slander the plaintiff can not introduce evidence as to his good character until it has been attacked by the defendant, for until then the law presumes it to be good and the defendant admits it." The admitted evidence in the Chubb case was that the plaintiff was a practicing physician—held admissible as showing his position in life and therefore bearing upon the question of damages.

In *Peltier vs. Mict*, 50 *Ill.*, 511, charging an infant female 13 years old with misconduct, the evidence was, not as to her reputation or character, but as to the occupation and pecuniary condition of herself and her father, with whom she lived—held admissible on the ground that "in actions of this sort, the plaintiff is always permitted to prove his condition in life, as bearing on the question of damages."

In *Russell vs. Washington Post Co.*, 31 *D. C. App.*, 277, the declaration alleging that the plaintiff was a minister of the Gospel by profession and a writer of religious articles for religious papers and of pamphlets and books which had a large circulation and sale from which he derived an income, it was held that evidence as to the size of his congregations and the extent of his writings and publications

and of their circulation was relevant and proper. No question of admission of evidence as to his general reputation or character was presented.

In *Cox vs. Strickland*, 101 *Ga.*, 482, the plea was justification, and under a statute which placed the burden of proof under that plea on the defendant, with all the privileges of one holding the affirmative except the right to open and close before the jury. The syllabus, alone, contains anything whatever tending to support appellee's contention here; the only question of admissibility of evidence presented in the case being whether the defendant could offer evidence of plaintiff's bad reputation, under the plea of justification. So in *Ratcliffe vs. Courier-Journal*, 99 *Ky.*, 416, the issue was under a plea of justification, which the authorities agree places the plaintiff's character in issue, and, as in the preceding case, the only matter affording any support for the position of the appellee here is found in the syllabus, the only question in the case as to the admissibility of evidence being as to that offered by the defendant, attacking the reputation of the plaintiff.

In *White vs. Newcomb*, 25 *App. Div.*, 397, the pleadings are not shown in the report; but that they, as in the cases above cited, placed in issue the plaintiff's character is evident from the fact that the opinion simply follows, as governing the case, Stafford vs. Morning Journal, 142 N. Y., 598, in which case, the answer having alleged the defendant's inability to admit the allegation of the declaration as to the plaintiff's good character and reputation, the court, expressly recognizing that the general rule in actions of slander and libel forbids evidence by the plaintiff as to his good reputation where reputation is not a material issue or has not been attacked, held that the answer put the plaintiff's character in issue and made testimony concerning it admissible in chief.

In *Fowler vs. Chichester*, 26 *Ohio St.*, cited in one or more of the cases appearing in appellee's brief, the testimony was, not as to the reputation, but as to the social relations or status of the plaintiffs, the action being slander for words imputing immorality, and the evidence being as to membership of the plaintiffs in the Congregational Church and their connection with the church societies, etc.

If the position of the court in Press Pub. Co. vs. McDonald, *supra*, that the decision of a State Supreme Court may, as to the law of that court, be disregarded on the ground that the court misconceived the authorities upon which it relied, the opinion in Bennett vs. Hyde, 6 Conn., 24, relies upon Stowe vs. Converse, 4 Conn., 42, as governing the case; whereas, in Stowe vs. Converse, not only was there a plea of justification, but the plaintiff's evidence followed, and was strictly in refutation of, that for defendant, attacking plaintiff's character.

It is respectfully submitted,

1. That the trial court erred in refusing to hold that the publication complained of was not libelous.

2. That it erred in holding that a publication, alleging the "killing" of a man by the plaintiff, necessarily and conclusively charged the crime of murder.

3. That it erred, also, in taking from the jury the determination of the meaning of the publication sued upon.

4. That it further erred in excluding evidence of each of the prior publications, and especially of the prior publication in the *Post*, itself, upon the same subject-matter and in the light of which many if not all its readers must naturally have understood the article sued upon, and which was one of the attending circumstances of the publication which the appellant was entitled to prove for the consideration of the jury.

5. That it further erred in refusing to allow the jury to pass upon the truth of the publication as pleaded.

6. That it erred in admitting the evidence of the plaintiff's character, reputation for peace and order, etc.

7. That, upon these grounds, and upon each of them, there was error below, and the judgment should be reversed.

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THE WRIT SHOULD BE DISMISSED—AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

THE WASHINGTON POST COMPANY,
Petitioner,

vs.

JOHN A. CHALONER.

BRIEF FOR RESPONDENT.

This cause comes here on a Writ of Certiorari to the Court of Appeals of the District of Columbia, to review the judgment of that court and of the Supreme Court of the District of Columbia, in favor of Respondent, in the sum of $10,000, entered on the verdict of a jury in said Supreme Court of the District of Columbia for damages found to have been sustained by said Respondent as the result of a libelous article published in petitioner's newspaper, "The Washington Post," as will more fully hereinafter appear.

For convenience, we will hereafter refer to The Washington Post Company as the defendant, and to John A. Chaloner as the plaintiff.

STATEMENT OF CASE.

On Saturday, April 3, 1909, the defendant published in its morning newspaper, "The Washington Post," published in Washington, D. C., the folowing article:

> "John Armstrong Chaloner (Chanler) (meaning the plaintiff), brother of Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home.
>
> "Following the shooting, Chaloner suffered a nervous breakdown, and was ordered by his physician to take a long rest. He decided to visit his old friend, Maj. Emry, who, with Chaloner, was instrumental in founding Roanoke Rapids, a manufacturing town 5 miles from Weldon. Chaloner arrived at Weldon after traveling all night and was immediately hurried to Shadeland, where he received medical attention and temporary relief."

On February 26, 1910, the plaintiff brought suit against the defendant corporation for libel, claiming damages in the sum of $50,000. The defendant demurred to the declaration, which demurrer was sustained, and judgment for the defendant was entered thereon. Plaintiff, declining to amend his declaration, prosecuted an appeal to the Court of Appeals for the District of Columbia; the judgment of the lower court sustaining the demurrer to the declaration was by that appeal reversed; and the cause was remanded for trial. (See case of *Chaloner v. Washington Post Company*, 36 App. D. C., 231, 39 W. L. R., 41.)

On February 14, 1911, the defendant pleaded the general issue; and, on February 18, 1916, by leave of court, filed an additional plea in which it was alleged that "the article and words complained of * * * are true in substance and in fact according to the natural signification and without the meaning imputed to them in the several innuendoes."

The trial court, acting expressly upon the decision of the Court of Appeals, which reversed the judgment entered on the demurrer to the declaration, instructed the jury that the words sued on, namely, those which charged that the plaintiff "shot and killed John Gillard, while the latter was *abusing* his wife," were actionable *per se;* that the defendant, having published the article, was liable therefor; and, being of the opinion that no competent evidence was offered to establish the plea of justification, the trial court submitted to

the jury the single question of the *quantum* of damages to be awarded. (R. 47.)

The jury returned a verdict for the plaintiff of $10,000; and, from the judgment entered thereon, following the overruling of defendant's motion for a new trial, an appeal was prosecuted to the Court of Appeals for the District of Columbia. This proceeding is to review the last-mentioned decision of the Court of Appeals for the District of Columbia, which is reported in 47 App. D. C., 66, 45 W. L. R., 727, affirming the verdict and judgment of the lower court in all respects.

During the progress of the trial numerous exceptions were taken by the defendant to the admission and exclusion of evidence (some of which related to the general issue and some to the special plea of justification); and, at the conclusion of the court's charge to the jury, counsel for the defendant excepted to "so much" of the charge as told the jury that the words sued on were actionable *per se*. (R. p. 48.)

BRIEF AND ARGUMENT.

This case was tried by the court below upon the theory that the words "shot and killed John Gillard, while the latter was abusing his wife," were libelous *per se*, in that they charged the plaintiff, as has now twice been held by the Court of Appeals of the District of Columbia, with having committed the crime of murder; and that, therefore, the only question which could properly be

submitted to the jury, in the absence of competent evidence to sustain, or tending to sustain, the plea of justification, was the *quantum* of damages to be awarded, having regard to the plaintiff's condition in life, and his standing and reputation in the community in which he lived. In this connection, it must at all times be remembered that counsel for the defendant specifically abandoned his special plea of justification, but not until the plaintiff, in the face of it, had put on his case in chief—indeed, not until well nigh the end of the entire trial, when that abandonment came without any previous indication of such purpose. (See R. p. 5.)

The numerous assignments of error in the last appeal to the Court of Appeals were, by the defendant, consolidated and treated as of the following effect:

> I. The court erred in holding the publication libelous per se and refusing to allow the jury to pass upon its meaning. (Assignments of error 14 and 15.)
>
> II. In refusing to allow the jury to pass upon the truth of the publication as pleaded, and to find the defendant not guilty if found true. (Assignment 15.)
>
> III. In the erroneous admission of testimony tending to excite, inflame and enlist the sympathies of the jury, and to the allowance of excessive damages. (Assignments 1, 2, 3 and 11.)

IV. In excluding testimony of circumstances competent and tending to the mitigation of damages. (Assignments 6, 7, 8 and 10.)

To the foregoing there is now added for the consideration of this Honorable Court the question raised by Assignment of Error No. 13 (R. p. 6)—which was not urged in the Court of Appeals—to the effect that the trial court "erred in refusing to grant defendant's motion for a directed verdict."

For convenience, we will follow as closely as practicable the arrangement of the defendant's brief here, discussing the various points of contention in the order in which the defendant advances them. (See petitioner's Brief, p. 8.)

I.

DID THE TRIAL COURT ERR IN REFUSING TO DIRECT A VERDICT FOR DEFENDANT?

This proposition, as stated, is covered by defendant's assignment of error No. 13 (R. p. 6), but the same was not urged in the Court of Appeals. The assignment itself (R. p. 44) is founded upon the express ground that the article sued on is "not *susceptible* of the meaning attributed to it;" and, with no further ground than that assigned, counsel for the defendant insist that the same raises "the first and fundamental proposition

to be considered" by this Honorable Court upon this Writ of Certiorari. At page 8 of defendant's brief we find this:

> "The defendant earnestly contends that this is not a proper case for submission to the jury for the reasons (1) that the article complained of is not libelous *per se;* (2) that it is not susceptible of a construction that it charges the plaintiff with the crime of murder, *and therefore cannot be found to be libelous by a jury;* and (3) *no extraneous evidence was introduced that would supply this defect in the plaintiff's case and make it possible to be construed as libelous.*"

We respectfully submit that the defendant, having failed to urge in the Court of Appeals the point covered by Assignment of Error No. 13 has waived the same. Furthermore, the contentions with respect to it (including the third one, which is not covered by the Assignment) are entirely inconsistent with the propositions contended for under propositions numbered II and IV of his brief here, wherein it is insisted that the trial court erred "In holding the publication libelous *per se* and *refusing to allow the jury to pass upon its* meaning." (See Assignments of Error Nos. 14 and 15, and page 8 of defendant's brief here.) Certainly the question ought either to have been submitted to the jury, or not submitted; and the

defendant should stand or fall by either one or the other of his propositions. He cannot successfully maintain both. At any rate, we pass to a consideration of the defendant's proposition numbered II, for, by the answer to it, the correctness of the first proposition must be determined.

II.

(a) ARE THE WORDS LIBELOUS PER SE? AND (b) DID THE COURT ERR IN REFUSING TO ALLOW THE JURY TO PASS UPON THEIR MEANING?

(a) *Are the words libelous per se?* As pointed out by the Court of Appeals in its decision of the appeal from the judgment entered on the demurrer to the declaration (36 App. D. C., 231; 39 W. L. R., 41),

> "the plaintiff, instead of alleging broadly that the defendant intended to falsely and maliciously charge him with the commission of a crime, *specifically limited himself to the averment of an attempt to so charge him with the commission of the crime of murder.*"

The demurrer, therefore, admitted the falsity of the words, their publication, the malice, and also the correctness of the innuendoes, *unless they attributed to the words a meaning not justified by*

the words themselves, or by extrinsic facts with which they were connected. The questions thus squarely presented to, and decided by, the Court of Appeals on the first appeal were: (1) Whether the words, considered alone, charged the plaintiff, as a matter of law, with having committed murder; or (2) if they did not, in and of themselves, charge the plaintiff with having committed the crime of murder, whether they were susceptible of conveying the meaning attributed to them by the innuendoes set out in the declaration. The same question was, of course, again raised by the motion to direct a verdict which, as shown by page 44 of the Record, was put upon the ground that the words are not susceptible of the meaning attributed to them.

In holding that the words sued on were libelous *per se* the Court of Appeals for the District of Columbia stated that—

> "The only question presented by the demurrer is whether the language of the publication is libelous *per se*;"

and, after adding that "a strict rule of construction is to be applied where the libel consists of a printed publication," the court thus approached the "single question" presented by the appeal from the judgment on demurrer to the declaration, and said:

> "It is contended by counsel for defendant that the publication does not charge the

plaintiff with the commission of the crime of murder as alleged in the declaration. In determining whether or not the publication is libelous *we think it is not necessary that it in terms charges plaintiff with the crime of murder. It would be sufficient if the publication were such as to cause the public to reasonably infer from reading it that the plaintiff had been guilty of this crime.* The unlawful killing of another may constitute murder in either the first or second degree, *and unless there is something IN THE PUBLICATION which would clearly convey to the reader that the killing was justifiable or the circumstances are such as to reduce the crime to manslaughter,* and thus remove the impression that the plaintiff had been guilty of the crime of murder, then it must be held that the declaration states a cause of action. * * *

"It is insisted by counsel for the defendant that the statement in the publication that plaintiff 'killed John Gillard, while the latter was abusing his wife,' is sufficient to convey the impression that the killing was justifiable. With this contention we do not agree. *To charge another with the killing of a human being, with no other words of limitation or qualification than are here used, imports the crime of murder in one of its degrees. When*

> *this is the natural deduction to be drawn from the language used, the burden is upon the defendant to show that the words used in the publication are to be interpreted in a sense different from their ordinary and natural import. Emerson v. Miller,* 115 Ia., 315; *Shockly v. McCauley,* 101 Md., 461.
>
> "We are of the opinion that the qualifying words here used are not sufficient to remove the reasonable inference that the crime of murder had been committed."

The following authorities sustain our contention that the words are actionable *per se:*

In the case of *Washington Times v. Downey,* 26 App. D. C., 258, the court said:

> "Whether any of the statements in the publication complained of amount to a charge of the commission of a criminal offense, though a trivial one, is immaterial, for, without doubt, they do contain charges tending to bring the plaintiff into contempt, ridicule, and disgrace. Consequently, the publication is libelous *per se.*"

In *Taylor v. Carey,* 1 Minor (Ala.), 258, the court used the following language:

> "*But every homicide is judicially, as well as to the common apprehension of man-*

> *kind, deemed felonious unless the circumstances of justification or excuse appear.* By the verdict in the record it appears that the defendant publicly, falsely and maliciously said to the plaintiff, 'You have killed my brother and I will kill you;' "

and those words were held to be actionable *per se.*

> "A written or printed statement or article, published of or concerning another which is false and tends to injure his reputation, and thereby expose him to public hatred, contempt, scorn, obloquy, or shame is libelous *per se.*"

Culmer v. Canby, 101 Fed., 195.
Raymond v. U. S., 25 App. D. C., 555; 33 W. L. R., 514.
Herrick v. Tribune Co., supra, 108 Ill. App., 244.
Atwill v. McIntosh, 120 Mass., 177.
Williams et al., v. Fuller, 97 N. W., 246.

> "The words of a libelous publication are to be taken in their natural and obvious meaning; *the test being what would men of ordinary understanding infer from such words.*"

Morse v. Times Republican Ptg. Co., 100 N. W., 867.

In *Weeks v. News Publishing Co.*, 117 Md., 126, it was held that—

> "It is not necessary, to constitute a libel, that the publication charge one with the commission of a crime, or with having a contagious disease, but any words which *impute* conduct or qualities tending to injure his character, or to degrade him, or to expose him to contempt, ridicule or public hatred, are libelous *per se*."

The case of *Woolworth v. Star Company*, 90 N. Y., 147; 97 App. Div., 525, holds that—

> "A written or printed statement or article published of or concerning another, which is false, and *tends* to injure his reputation and thereby expose him to public hatred, contempt, scorn, obloquy or shame, is 'libelous per se.' "

Belo v. Fuller, 84 Tex., 450; 19 S. W., 616:

> "It is not necessary that words, to be actionable *per se*, should charge a crime in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood as a charge of crime."

In 17 *Ruling Case Law*, sec. 53, it is laid down that—

> "There are now well-settled rules of construction in reference to the determination of the defamatory character of written or oral words. In the first place, the old rule that words are to be taken in their milder sense in determining their actionable character has long since been abandoned. (*Chaddock v. Briggs*, 13 Mass., 248.) The ordinary signification in popular parlance of the statement made is the vital question in each case, or, in other words, is the question of natural and obvious meaning of the words used. For example, it has been held that the fact that persons knowing a woman concerning whom an article is published will not understand it in any other than an innocent sense, does not prevent its being libelous, if it was such that persons unacquainted with her would understand therefrom that she was a person of low character and guilty of improper and immoral conduct."

In the case of *Pollard v. Lyon*, 96 U. S., 225, are found the following expressions by this Honorable Court:

> "Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that

the party is afflicted with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or engaged as a livelihood in a profession or trade. * * *

"Actionable words are doubtless such as imply damage to the party; but it must be borne in mind that there is a great distinction between slander and libel, and that many things are actionable when written and published which would not be actionable if merely spoken, without averring and proving special damage."

* * * * *

"Defamatory words must impute a crime involving moral turpitude, punishable by indictment. It is not enough that they impute immorality or moral dereliction merely, but the offense charged must be also indictable.

"Formulas differing in phraseology have been prescribed by different courts: But the annotators of the American Leading Cases say that the Supreme Court of New York in the case of *Parker v. Coffin*, 'appear to have reached the true principle applicable to the subject,' and we are inclined to agree with that conclusion, it being understood that words falsely spoken of another may be actionable *per se* when they impute to the party a criminal offense for which the party may be indicted and pun-

ished, even though the offense is not technically denominated infamous, if the offense charged involves moral turpitude and is such as will affect injuriously the social standing of the party.

"Decided support to that conclusion is derived from the English decisions upon the same subject, especially those of modern date, many of which have been very satisfactorily collected by a very able text-writer (Addison on Torts, 3rd Ed., 765). Slander in writing or in print, says the annotator, has always been considered in our law a graver and more serious wrong than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and is generally propagated wider and farther than oral slander. Written slander is punishable, in certain cases, both criminally and by action, when the mere speaking of the words would not be punishable in either way."

Counsel for defendant, in their zeal to find in the article sued on some words of doubtful meaning, have seized upon the clause, "while the latter was abusing his wife;" and it is insisted that they are "words of limitation;" that they are qualifying words; that they render the charge ambiguous, if not harmless; and that, therefore, the

question as to the sense in which they were used should have been submitted to the jury.

We respectfully submit that the words "while the latter was abusing his wife," do not in the slightest degree qualify the clause "shot and killed John Gillard." On the contrary, they are without doubt as strict words as could have been employed for the amplification and rendering libelous the latter clause, for they make the whole sentence show on its face that the killing was not justifiable. The majority of readers, including laymen of ordinary learning, would understand that A would not be justified in the eyes of the law in killing B merely because the latter was *abusing* his wife. Especially is this true when, for aught the readers of the article in suit could know from its words that the abuse to which Mrs. Gillard was being subjected was verbal abuse only. Regarding the words even in the light most favorable to the defendant's contention, namely, that the wife of Gillard was actually receiving a beating—physical abuse, if you please—the average reader would understand that the killing of the husband would not be justifiable. The law has never prescribed the death penalty for wife-beating, much less has it ever authorized a private citizen summarily to execute a wife-beater when he is caught in the act.

At page 20 of defendant's brief here, we find the following remarkable contention:

> "In order to hold that the words used were libelous, *per se*, it was incumbent upon the court to decide that *all reasonable minds would necessarily reach the conclusion that the charge of killing Gillard, with the qualifying words, 'while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home,' charged the plaintiff with the crime of murder in one of its degrees.*"

In the case of *Peck v. Tribune Company*, 214 U. S., 185, this Honorable Court was considering a libelous publication which charged the plaintiff with having highly commended Duffy's Pure Malt Whisky, "after years of constant use," both by herself and her patients—she being a trained nurse. It was there contended that there was no general consensus of opinion that to drink whisky is wrong or that to be a nurse is discreditable. In disposing of the questions there presented, Mr. Justice Holmes said, in part:

> "* * * As was said of such matters by Lord Mansfield, 'Whatever a man publishes he publishes at his peril.' The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly harmful statements concerning an individual, *without other justification than exists for* an advertisement *or a piece of news*, the usual principles of tort will make him liable, if the

statements are false or are true only of someone else. (*Morse v. Brochu*, 151 Mass., 567.)

"The question, then, is whether the publication was a libel. It was held by the circuit court of appeals not to be, or at most to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whiskey is wrong or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action of libel is of little use, but while it is maintained, it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote. We know of no decision in which this matter is discussed upon principle. *But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action.* No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable

fraction of that number to regard the plaintiff with contempt is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed as dishonest and even seems to be regarded by many with pride. It seems to us impossible for us to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view." (*Culmer v. Canby*, 101 Fed., 195; *Twombly v. Monroe*, 136 Mass., 464; *Gates v. New York Recorder Co.*, 155 N. Y., 228.) (Italics ours.)

On the last appeal, counsel for the defendant contended that, on the appeal from the judgment overruling the demurrer to the declaration, the court of appeals did not hold the words libelous *per se;* but, in disposing of the last appeal the court left no doubt that it was their intention so to hold on the former appeal. Thus, the question as to the actionable character or quality of the words has been passed upon as follows: By Chief

Justice Shepard and Associate Justices Robb and Van Orsdel on the first appeal, and on the latter appeal by Chief Justice Smyth and Associate Justices Robb and Van Orsdel, all concurring upon each occasion.

(b) *Did the court err in refusing to allow the jury to pass upon the meaning of the words?*

In order clearly to understand the situation presented by this record, and especially the precise point now under consideration, we deem it necessary briefly to advert to some of the steps taken in the case. As pointed out by the Court of Appeals in its opinion overruling the demurrer to the declaration and remanding the case for trial, reported in 36 App. D. C., 231, 39 W. L. R., 41, the plaintiff expressly limited himself to pleading that, by the article complained of, the defendant meant to charge him with the crime of murder. To the declaration, thus limited in scope, the defendant pleaded, first, the general issue; and, second, a special setting up that the "article and words complained of are true in substance and in fact according to the natural and ordinary signification and without the meaning imputed to them in the several innuendoes." (R. p. 4.)

Upon the issues thus made, plaintiff proceeded with his affirmative case by proving (1) the publication of the article by the defendant; (2) by uncontradicted testimony, his standing and condition in life, and his reputation (which the law presumes was damaged, especially when a plea of truth and justification is interposed); and (3)

that the part played by plaintiff in the tragedy at "The Merry Mills" when John Gillard lost his life, did not constitute murder.

It thereupon became incumbent upon defendant to go forward with his defenses, which he could have done either by showing (1) that he did not publish the libelous article, or (2) that "in the light of extrinsic facts" with which the libelous words were connected, said words were "true in substance and in fact according to the natural and ordinary signification and without the meaning imputed to them." In other words, it could have shown, as defendant asserted by its special plea it would do, that, by the surrounding circumstances the words were true in their ordinary signification and not in the sense in which plaintiff said they were published. Instead of doing that, however, the only witness put upon the stand by defendant (R. pp. 29, 34 and 42) testified that he had no independent recollection of the article complained of, and that it *was* published in the defendant's newspaper in the form it was received from the wire, the reporter having sent it from Charlottesville, Virginia; and the defendant then contented itself with merely pointing out what it claimed to be inconsistent statements in the testimony of the plaintiff and his witnesses for the purpose of showing that what occurred at "The Merry Mills" did not constitute murder. Defendant also insisted that, by articles published in its own and other newspapers 16 days prior to the publication of the article complained of,

it could properly show different happenings than those testified to by plaintiff and his witnesses; and said prior articles were excluded, as will hereinafter appear. The foregoing constitutes the only showing which the defendant attempted to make; and, furthermore, all of its testimony was offered on the general issue, in mitigation of damages, and its special plea was specifically abandoned. (See R. p. 43.)

It is now argued here that the case should have been taken from the jury because the article complained of is not *susceptible* of the meaning attributed to it. The defendant assumed the burden of showing that the words were true, and that they were used in a sense different from that ascribed to them in the plaintiff's declaration, but that burden was not even attempted to be sustained in even the slightest degree or respect; and we submit that, plaintiff having proved that he was not guilty of murder, and there was not a syllable of evidence to contradict the testimony offered by and in his behalf; there was nothing for the trial court to do but submit to the jury the question of damages. At the close of the case, there was nothing to go to the jury other than the question of damages, because the pleas of the defendant had not been supported by any evidence and there was no question for the jury as to the sense in which the words were used, or whether they were published. Furthermore, the jury did, in effect, pass upon the meaning of the words complained of in connection with their assessment of damages for the

plaintiff, and we must assume that they answered the contention of the defendant adversely; for, in the court's charge to the jury, he expressly told them that—

> "* * * you are also to consider the circumstances out of which the libel sprang —what, in fact, did occur down at Merry Mills on the day in question. *The defendant has a right to have you consider the circumstances, if in any way they tend to mitigate* the damages. It is admitted that something did—a tragedy did—occur; it is not as if the libel had sprung out of nothing, as if it had been made out of whole cloth; it is admitted there was a tragedy; that there was the explosion of the pistol, and there was the death of a man in consequence, and you have heard described here the occurrence itself by eye-witnesses.
>
> "You will have the right to consider all those circumstances in making up your minds how much the plaintiff has been damaged, and how much the defendant ought to be adjudged to pay by reason of having published this article."

We submit that the jury must have been satisfied with plaintiff's showing as to what occurred when Gillard was killed, and that, the defendant having expressly abandoned its pleas and confined its efforts to the mitigation of damages, it had the

benefit of all it was entitled to at the hands of the trial court and the jury. The two lower courts have concurred in the findings of the jury on the facts submitted to it, and a review here is not in order on Certiorari.

III.

DID THE COURT ERR IN EXCLUDING PRIOR NEWS ITEMS IN ITS OWN AND OTHER NEWSPAPERS RELATING TO THE TRAGEDY AT "THE MERRY MILLS?"

It must be remembered that the plaintiff, in his declaration (R. p. 3), specifically pleaded his version of what happened at "The Merry Mills" when John Gillard lost his life; that he and his witnesses testified at the trial in substantiation of those allegations; and that the defendant, with its plea of justification still in the case, put on the witness stand its witness Spurgeon (R. p. 30), the Managing Editor of the Post, who testified in substance that the article sued on was published substantially in the form it was received by wire or mail from the Post's correspondent at Richmond, Virginia. Spurgeon was the only witness called to the stand by the defendant; and it contented itself with offering in evidence articles published in two other Washington papers, The Star and The Times, together with one of its own publication, sixteen days prior to the publication of the article in suit. It was contended at the time,

and is now urged here, that those prior articles should have been received in evidence as part of the defendant's case for the purpose of "showing the surrounding circumstances," namely, what happened at the "Merry Mills," and that those happenings were different from the occurrences alleged by the plaintiff and described by him and his witnesses. The same articles were offered by the defendant upon the general issue (R. 43) in mitigation of damages, and the plea of justification was abandoned by the defendant.

We respectfully submit that those articles were not admissible in the defendant's behalf for any purpose whatever, because—

(1) They fall far short of satisfying the rule requiring the best evidence possible to be produced;

(2) They would have tended to impeach or contradict the plaintiff in testimony upon a matter purporting to be uttered by him;

(3) They are purely hearsay; and

(4) *Non-libelous* articles published *prior* to the article sued on are not admissible for any purpose whatsoever. Even *libelous* articles published prior to the article sued on, when published in a paper other than defendant's, are admissible, according to the weight of authority, only on the question of good faith and in mitigation of damages.

It is not surprising that counsel for defendant have cited no authorities to sustain, or even tending to sustain, their contention in this regard. To hold that *unconnected* and *prior* articles in defendant's newspaper are admissible would be to establish the proposition that a newspaper publisher could, by a non-libelous first article, lay a foundation which would enable him to publish later a most libelous fabrication and escape the consequences thereof. Such a contention is contrary to all rules of law governing libel cases, and, we submit, is without reason, precedent, or authority; and there is not involved in the proposition any considerations of public importance to warrant this Honorable Court in passing upon the same upon this writ of Certiorari.

The general rule on this subject was applied in the case of *Washington Herald Co. v. Berry*, 41 App. D. C., 322, which was an action founded upon certain articles appearing in the defendant company's newspaper. The defendant pleaded the general issue and a *special plea, setting up another article in its own paper and other articles in the Times and Star*. Defendant also sought to justify on the ground that the subject-matter of the libel had been the object of a Congressional inquiry. Plaintiff himself read in evidence two articles from the Herald, "both of which were contained in the defendant's plea." During the trial, defendant offered to read in evidence "so much of the third plea as recited the article of June 21, 1911," and the court held that, under the repli-

cation, the plea was not admitted to be true; but that the article offered was irrelevant and excluded it. The articles in the Star and Times were also excluded. Respecting the assignment of error relating to the article set up in the special plea, the Court of Appeals for the District of Columbia remarked that the plaintiff had read the same and that they were in evidence, and said:

> "They were not relevant, and constitute no justification for the defendant's libel. *Hotchkiss v. Lothrop*, 1 Johns, 286.
>
> "That other newspapers may have published articles relating to the plaintiff and his controversy, whether libelous or not, afford no *justification* for the defendant's publication. The plea did not make a case of conditional qualified privilege. The plaintiff was a private person who had resigned from public office, and, while the article relating to him may have made a 'good story,' in the view of the publishers of the Herald, it was not a privileged one."

Newell on Slander and Libel, page 1075, contains the following:

> "The 'Observer' published an inaccurate report of the trial of an action brought against the plaintiff. Defendant copied this report *verbatim* into his paper. It was held that many other papers besides

the defendant's had also copied the statements from the 'Observer' was inadmissible. *Saunders v. Mills*, 6 Bing, 213, 3 M. & P., 520; *Tucker v. Lawson*, 2 Times L. R., 593. Evidence that defendant had copied it from the 'Observer' into his own paper had been admitted apparently without question at the trial; but in allowing that evidence, Tindall, C. J., says: 'It appeared to me that I had gone the full length.' (6 Bing, 220.) In *Talbott v. Clark* (2 Moo. & Robb., 312) Lord Denmon says, referring no doubt to *Saunders v. Mills*, 'I know that in a case in the common pleas it has been held that a previous statement in another newspaper is admissible; but even that statement had been very much questioned.' "

It is well settled that prior articles are never admissible for any purpose other than in instances where a defendant offers prior *libelous* articles which he has copied; and then they are admissible only on the question of good faith and in mitigation of damages. An examination of the particular prior articles which were excluded in the case at bar (R. 31-34, 36-37, and 38-42) will clearly show that the argument of defendant for their admission has no foundation in law or reason.

The authorities cited by counsel for the defendant under this heading of his brief (Proposition

No. III) regarding "retractions," have no bearing upon the question here under consideration, for there is no element of retraction involved.

Further, with respect to the argument of the defendant that the prior articles in other newspapers and its own were admissible for the purpose of showing the "surrounding circumstances," and to put before the jury "the occasion in which the words were used," it is too plain to require argument that the articles in question are not competent for any such purpose. They do not even approximately satisfy the best-evidence rule; they tend to impeach the plaintiff in a matter purporting to be uttered by him; they are the purest hearsay; and they are not proper to be admitted for any purpose whatsoever, more especially to show "the surrounding circumstances," or what happened at the time Gillard lost his life. They show that the best evidence obtainable by the defendant was not offered, to prove what happened when Gillard was killed—their subject-matter shows that the information therein contained was procured from *some* source and sent to and used by the Post; and yet no witness was offered by the defendant to testify to the same tenor as the articles themselves, and no reason was given for the failure to produce the person who procured and furnished the data for the publication of those prior articles. Such evidence must have been obtainable, and it was incumbent upon the defendant to produce it if it earnestly desired to justify by proving from the "surround-

ing circumstances," that what plaintiff and his witnesses said was untrue. As the record stands, the plaintiff's evidence is absolutely unimpeached, and the jury has passed upon its meaning.

The case of *Rex v. Horne*, 2 Cowp., 672, cited at page 27 of defendant's brief, was a prosecution on information for libeling the King, by preparing and publishing affidavits casting aspersions on the King's troops. Defendant called a witness, showed him a copy of the Advertiser in which an affidavit had been published, and the witness testified that it had been published. Held that, as a defense to the charge of criminal libel, defendant was entitled to every technicality, and that the evidence was admissible.

At page 28 of the defendant's brief we find the following remarkable statement—

> "The trial court (R. p. 47) instructed the jury that 'the defendant has a right to have you consider the circumstances, if in any degree they tend to mitigate the damages.' *This charge, however, was without benefit to the defendant, when the mitigating circumstances had not been permitted to be shown.*"

As we have already pointed out, the evidence offered by the defendant for the purpose, as claimed by it, of showing the "surrounding circumstances" of the publication of the libel, was incompetent for that or any other purpose; and the

record will show that the defendant was afforded every possible opportunity to carry the burden of its special plea by showing its own version of those circumstances by competent evidence, and failed to do so. It should not now complain.

IV.

WAS THE TRIAL COURT JUSTIFIED IN REFUSING TO ALLOW THE JURY TO PASS UPON THE TRUTH OF THE PUBLICATION, AND TO FIND THE DEFENDANT NOT GUILTY IF FOUND TRUE?

We submit that the jury did pass upon the truth of the publication, and that question is foreclosed here, both the trial court and the Court of Appeals for the District of Columbia having upheld the verdict of the jury upon the same. Bearing in mind that the plaintiff specifically pleaded the facts which he expected to prove as to what actually happened at the "Merry Mills" when Gillard was killed, then went forward with his burden and with his witnesses, testified orally in support of those allegations; and, remembering also, that the defendant pleaded justification and abandoned the plea without offering ANY competent evidence to sustain the same—we submit that the jury's finding upon the plaintiff's uncontradicted evidence is conclusive. While the defendant would have the jury's verdict set aside, and earnestly attacks it because of supposed inconsistencies in the

statements of the plaintiff and his witnesses while relating on the stand what did occur when Gillard was killed, we submit that the weight of the testimony was for the jury; that the trial court was under the duty of giving the case to the jury, inasmuch as there was evidence to warrant the finding which resulted; and that the verdict is binding upon the defendant. Certainly the evidence is not such that all reasonable minds must concur in the view of the defendant that what the plaintiff claimed happened was improbable; and that would have been the only situation in which the trial court would have been warranted in taking the case from the jury. Not only was the case properly submitted to the jury upon the plaintiff's uncontradicted testimony as to what happened when Gillard was killed, but, as already stated, the defendant was afforded the advantage of the court's express instruction that, if the jury could find anything in the plaintiff's case to mitigate the damages, then, in that event they should give the defendant the benefit thereof. We must assume that defendant received that benefit, and that he has had all he was entitled to have at the hands of the jury.

The case of *Davis v. Coblentz*, 174 U. S., 719, cited by counsel for defendant at page 32 of their brief, has no application to the case now before the court, because in the case at bar the trial court submitted to the jury the question as to the credibility of the witnesses, and the weight to be given their testimony. This is in no sense a case in

which *"one party to an action testifies to a particular fact."* It is a case where several parties have testified to many facts, details, and circumstances going to make up the tragedy which occurred at the "Merry Mills" when Gillard lost his life; and there are no witnesses to the contrary, in support of defendant's plea of justification, or otherwise. Therefore, the jury, having found as a fact that what occurred at the time Gillard was killed did not constitute the crime charged, that verdict must be upheld.

V.

DID THE COURT ADMIT EVIDENCE CALCULATED TO INFLUENCE THE MINDS OF THE JURY AND TO AGGRAVATE DAMAGES?

It is earnestly contended by counsel for the defendant that the trial court erred in admitting, as a part of plaintiff's case in chief, evidence of the plaintiff's reputation and social standing; and, in discussing one of plaintiff's authorities cited in the Court of Appeals (*Harding v. Brooks*, 5 Pick. (Mass.), 247), the defendant at pages 39-40 of its brief in this Court, attempts to distinguish it by saying: *"Admission of evidence of the plaintiff's character in chief was held sustainable only because the plaintiff had pleaded justification, thus putting his character in issue."* The Harding-Brooks case is cited with express approval and followed by the case of *Press Publishing Company*

v. McDonald, 63 Fed., 238; and the foregoing quotation from defendant's brief not only correctly states the law as laid down in both of those cases, but our contention, based on those and many other cases, as well, namely, that the defendant here, having pleaded justification put in issue the plaintiff's reputation and character, thus entitling him to disprove the same as a part of his case in chief.

We respectfully submit that the plaintiff was properly permitted to introduce evidence as to his condition in life, his standing, and his reputation and character; and the following authorities sustain that contention:

In 25 CYC, pp. 482, 507, 508, the following language is found:

> "If justification is pleaded, plaintiff may show his good reputation in aggravation of damages."
>
> * * * * *
>
> "Worldly position and social standing may be shown in aggravation of damages."

Abbott's Trial Evidence, 2nd Ed., p. 847, *et seq.*, under the heading "Actions for Slander and Libel," states the law on the subject as follows:

> "The plea of justification puts the character of the plaintiff in issue, and evidence concerning his general character is admissible. Where the pleadings in an action

> for the recovery of damages for slander imputing unchastity to an unmarried female raise an issue as to the character of the plaintiff, she may prove, *as a part of her case*, that by the speech of the people, her reputation is good. * * * Where the plaintiff's character is in issue, he has a right to sustain it by proof of his general good character."
>
> *Ratcliffe v. Louisville Courier-Journal*, 99 Ky., 416.
>
> *White v. Newcombe*, 25 App. Div., 397.
>
> *Cox v. Strickland*, 101 Ga., 482.

The said author (Abbott), at page 843, says:

> "In aggravation of actual damages, plaintiff may give in evidence his own rank and condition in life, if in issue," * * *

and cites the following authorities:

> *Larned v. Buffington*, 3 Mass., 546.
>
> *Enos v. Enos*, 135 N. Y., 609.
>
> *Morey v. Morning J'nl Ass'n*, 123 N. Y., 207.

The case of *Morey v. Morning J'nl Ass'n, supra*, holds that proof of the nature of plaintiff's business, and that he is a married man, is competent to show the surrounding circumstances of the plaintiff, as bearing upon the hurtful tendencies

of the *libel*, and the general damage to which he is exposed.

In the case of *Post Publishing Co. v. Peck*, 199 Fed., 6, the court said:

> "We do not agree with the position of the defendant that it was not open to the plaintiff, in his affirmative case, to show his standing in, and capacity to earn, through his profession, because, under the theory which governed the trial, *a theory this is thought to be the right one*, the plaintiff's reasonable damages would, in a measure, directly and peculiarly depend upon these elements." Citing, 2 *Greenleaf on Evidence*, sec. 275; *Press Publishing Co. v. McDonald*, 63 Fed., 238, 11 C. C. A., 155, 26 L. R. A., 53; *Evening Journal Publishing Co. v. Simon*, 147 Fed., 224, 77 C. C. A., 366, petition for Writ of Certiorari denied in 203 U. S., 589.

In the case of *Press Publishing Co. v. McDonald*, 63 Fed., 238, 11 C. C. A., 155, *supra*, certiorari denied May 25, 1896, 163 U. S., 700, the court said:

> "Plaintiff in error insists that the court erred in admitting proof of the plaintiff's social standing, the evidence being, as it contends, introduced 'for the purpose of bolstering up the case before the jury (in order that) if the jury should be informed

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that defendant in error was a man of very high position in the world, they could only pay him for his wounded feelings by a verdict out of all proportion to that which would be given to an ordinary individual.' The authorities bearing upon this point are conflicting. The text writers are not in accord. In Massachusetts it was held as far back as 1807, that the plaintiff in actions for defamation of character may give in evidence to aggravate the damages his own rank and condition of life, because the degree of injury the plaintiff may sustain by the defamation may very much depend on his rank and condition in society. *Larned v. Buffington*, 3 Mass., 546. In *Harding v. Brooks*, 5 Pick., 247, Chief Justice Parker says: 'The rank and condition of the plaintiff are proper to be made known to the jury by evidence, because the damages may be lawfully affected thereby; but general character has not been the subject of inquiry *unless made necessary to the defense of the action or to the claim of damages.*'

"In Pennsylvania it was held by Judge Sharswood in *Klumph v. Dunn*, 66 Pa. St., 147, that: 'The position in life and the family of the plaintiff are important circumstances bearing upon the question of damages, and have always been held admissible for that purpose.'

"See also McCalmont v. McClelland, 14 Serg. & R., 359, where it is said that juries always take into view the condition of the life of the parties. The point is discussed at considerable length, and the court expressly lays down the proposition that the plaintiff in such cases may give evidence of his own condition in life to aggravate the damages. A similar rule is applied in Connecticut (*Bennett v. Hyde*, 6 Conn., 24); in Illinois (*Peltier v. Mict*, 50 Ill., 511); in Virginia (*Adams v. Lawson*, 17 Gratt., 250); and in Kentucky (*Eastland v. Caldwell*, 4 Am. Dec., 668).

"In *Foot v. Tracy*, 1 Johns, 52, Kent, C. J., says: 'In assessing damages, the jury must take into consideration the general character, the standing and estimation of the plaintiff in society; for it will not be pretended that every plaintiff is entitled to an equal sum for the worth of character. The jury must have, and must inevitably have, a very large and liberal discretion in apportioning damage to the rank, condition, and character of the plaintiff; and they must have evidence touching that condition and character so as to have guide to their discretion.'

"In *Palmer v. Haskins*, 28 Barb., 95, Marvin, C. J., says: 'That the general standing in society of either of the parties may be proved, I have no doubt.'

> "We are of opinion that the weight of authority is clearly in support of the proposition that the condition in life of the plaintiff may properly be given in evidence in chief to aggravate the damages. Of course, if some peculiar and special damage is claimed, it should be specially pleaded."

In the case of *Russell v. Washington Post*, 31 App. D. C., 277; 36 W. L. R., 377, an action for libel, the District of Columbia Court of Appeals held that—

> the plaintiff, a minister of the gospel, as well as an author and writer of books, should have been permitted to prove the extent of his writings and their circulation, and the size of his congregation, as bearing upon the question of damages; and that the exclusion of such evidence, or confining it to the showing of a "wide circulation all over the world," and that he was "the author of several books," was reversible error.

The case of *Bailey v. Holland*, 7 App. D. C., 184, was a libel case where justification was pleaded, and the plaintiff was allowed to, and did, prove his good reputation without question. Furthermore, in that case, as here, there was a total failure of proof by the defendant, and the Court of Appeals refused to disturb the verdict of the jury.

Archibald D. Dabney, a witness for plaintiff,

testified, over objection of counsel for the defendant, that plaintiff's reputation in the community for peace and good order is "excellent." Dr. Francis Lee Thurman, on behalf of the plaintiff, testified that his reputation was as follows: "He had an honorable, upright reputation among his neighbors, considered as a man of first-class character, a man of broad charities * * *," and on cross-examination stated that, "He has always had a good reputation for peace and good order." (R. pp. 9, 10 and 11.) The foregoing occurred as a part of plaintiff's case in chief, and that is the testimony objected to here by defendant as "setting the plaintiff on a pedestal." We submit there is no harm done the defendant, for the replies of the witnesses stand for no more than would the statement that plaintiff's reputation was good, and that he is an upright man.

At page 38 of defendant's brief it is stated that "the allegation of the declaration that the plaintiff is of good fame, etc., is merely inducement, not traversable;" * * * but we respectfully solicit the attention of the court to the fact that, in his declaration, plaintiff did plead, with great particularity, "hurt and prejudice to his good name, fame, credit and esteem," etc. (R. p. 3.) The defendant pleaded justification, and thus put in issue the plaintiff's character and reputation, and warranted beyond all doubt the admission of evidence of those qualities.

At page 38 of defendant's brief it is stated that

> "this case is the first in this jurisdiction, since its formation, which changes the general rule heretofore always enforced, that in actions of slander and libel, *in the absence of a plea of justification*, the plaintiff may not introduce evidence of his general reputation or character until the adverse party has introduced evidence attacking it;"

and it is urged that a "new and wide line of proofs and controversy is introduced" and will become embarrassing to the administration of justice if this case be not reversed. We answer that no new decision is rendered here, and, the same being in harmony with the rule announced in the Federal Courts and the State Courts as well, it must stand. We have been unable to find any authority in any jurisdiction wherein the plea of justification of libel has been interposed and the question of the right of plaintiff to offer evidence in support of his standing, reputation, character, and condition in life has been squarely raised, that such right has not been upheld.

17 *Ruling Case Law*, sec. 70, states that:

> "The plea of the truth is a deliberate reassertion of the original charge, and estops the defendant from showing that it was published by a mistake. *King v. Root*, 4 Wend. (N. Y.), 113. Failure to plead the truth of the charge justifies the jury in

dealing with the case on the theory that the words spoken are not true. *Brinsfield v. Howeth*, 107 Md., 278; 24 L. R. A. (NS), 583. *The plea of the truth, and failure to establish the same may, as a rule, be considered by the jury as evidence of malice on the part of the defendant and the damages may be aggravated. Dauphing v. Buhne*, 153 Calif., 757; *Krulic v. Petcoff*, 122 Minn., 517; *Gillman v. Lowell*, 8 Wend. (N. Y.), 573."

In the case of *Beasley v. Meigs*, 16 Ill., 139, 91 Am. St. Rep., 306, the defendant, in connection with his opening statement read to the jury his notice or plea of justification; but, at the close of the plaintiff's case, that plea was withdrawn (by leave of court), and the trial court instructed the jury that it might consider the defendant's act of pleading justification and reading its notice of such plea to the jury, in aggravation of damages. The Supreme Court of Illinois, in upholding that instruction, said:

"Nor did the fact that the notice was withdrawn render the instruction improper. It had been read in the hearing of the jury and bystanders, and striking it from the record did not destroy the effect it may have produced, or relieve the defendant from the consequences of republishing the charge. If the use made of the notice was

> a causeless and wanton republication of the slander, the jury were justified in giving greater damages, notwithstanding the defendant may have withdrawn it by leave of court."

In the case at bar, no instruction was given to the jury regarding the effect of defendant's having pleaded justification and its subsequent abandonment without evidence in support thereof; and no such instruction was asked by plaintiff. On the contrary, the jury were, as aforesaid, expressly told that they may consider the plaintiff's *own* evidence, and if they found anything in it to mitigate the damages, the defendant was entitled to the benefit of it.

DEFENDANT'S AUTHORITIES DISCUSSED

Brown v. Tribune Ass'n, 77 N. Y. S., 461 (page 12 of defendant's brief): The very words used by counsel in discussing this case show that it is not in point, except in so far as it may state general principles, with which we entertain no difference of opinion. In that case the charge was that the "family accused the wife (the plaintiff) of having been the cause of her husband's *suicide*," the accusation is held non-libelous.

Gallup v. Belmont, 16 N. Y. S., 483 (page 13 of defendant's brief): This case is no authority here. The alleged libelous matter shows on its

face that the plaintiffs were charged with no crime, breach of duty, or anything improper. In comparing defendant's quotation with the opinion in this case, we find that the omission indicated by the asterisks (more than 11 lines of print) shows that there was no charge against wrongdoing—merely that they were officers of a club and neglected to pay certain prizes which had been awarded. There was no allegation that either was treasurer, or that they had been guilty of anything more than stated; and we hold no different views from those expressed in that case, for, as there pointed out, each case must be determined upon its own facts.

Herringer v. Ingberg, 91 Minn., 71 (page 14 of defendant's brief): This case amounted, as stated by the court, to nothing more than a reasonable criticism by the defendant of the plaintiff as a public officer. The plaintiff was charged merely with incapacity and the use of bad judgment in his official acts.

We are unable to understand definitely the point attempted to be made in counsel's argument at page 14 of their brief; but, if it is intended to call attention to their view that the Court of Appeals realized the plaintiff had limited himself to the claim that the article sued on charged him with murder, we readily agree. The court, at the very outset of its opinion said: "The plaintiff, instead of alleging broadly that the defendant intended to falsely and maliciously charge him with the commission of *a* murder, specifically limited him-

self to the averment of an attempt to charge him with the commission of the crime of murder." That court has twice held the words to be libelous *per se*, because, in its view, "to charge another with the killing of a human being with no other words of limitation than are here used imports the crime of murder in one of its degrees."

Further, as to defendant's argument on page 14 of the brief: Certainly if A publishes an article saying that B killed C, without more, the article is not libelous *per se*, and could only be made libelous by proof of the words having been used in that sense. That simple statement would be understood by the man in the street to mean either one of two things, a justifiable killing or one not justified; but otherwise if the example went further, as in this case, and imported the crime of murder into the charge by an expression which tends to destroy the idea of possible justification.

We are at a loss to understand how counsel can say that the court of appeals on the second appeal rendered its decision "without reviewing the completed record." An examination of Mr. Chief Justice Smith's opinion will show that the completed record was reviewed, and very thoroughly.

Thompson v. Sun Publishing Co., 91 Me., 203 (page 18 of defendant's brief): Defendant's quotation from this case is correct, and it states the general principles laid down by all the authorities; but it is interesting to note that, at page 207, the Maine court said: "If the defamatory words, taken in their natural and ordinary signification

fairly import a criminal charge, it is sufficient to render them actionable." That case holds that the statement published in the defendant's newspaper, "He has a wife living in the west," when considered in reference to all the other averments in the declaration impute, with reasonable certainty, to the plaintiff the crime of bigamy or polygamy.

Bihler v. Gockley, 18 Ill. App., 496 (page 17 of defendant's brief): This is a *slander* action holding that the words involved were not *prima facie* defamatory; but that, being reasonably susceptible of the meaning attributed to them the question should have been submitted to the jury to say "whether under all the circumstances the bystanders understood them in that sense."

Mitchell v. Sharon, 51 Fed., 424, decided by the Circuit Court for North Dakota (defendant's brief, p. 18): This is a *slander* case, and holds that it is not actionable to say of another that he is "guilty of the crime of concocting a blackmail or extortion scheme," because the words charge merely a plan or purpose to extort money, which is not punishable in the absence of an attempt to carry it out. In the course of the court's opinion, immediately preceding the sentence with which counsel for defendant here have commenced their quotation, we find the following:

> "The office of the innuendo is not to enlarge the meaning or to change the sense of the words spoken, and, if it does do so, it may be rejected; and if the words them-

> selves are clearly actionable a demurrer to the complaint should be overruled because the plaintiff, if he fails to show the meaning alleged in the innuendo, may fall back upon the words themselves and claim that, taken in their natural and obvious signification, they are actionable without the alleged meaning and that, therefore, his unproved innuendo may be rejected as surplusage."

Herrick v. Tribune Co., 108 Ill. App., 244 (page 19 of defendant's brief): This is a case strongly relied upon by the plaintiff in the case at bar. The case was taken to the appellate court by a writ of error to reverse the judgment of the lower court sustaining a demurrer to a declaration for libel, the innuendo being "thereby meaning and intending falsely that plaintiff had feloniously caused the death of Edward P. Herrick. In holding the words libelous and reversing the lower court, the Illinois Court of Appeals said:

> "Written language which has a tendency to bring the plaintiff into disgrace, to diminish her reputation, to induce an ill opinion of her, or to alter her station in society, is actionable per se."

That case is followed in *White v. Bourguios*, 204 Ill. App., 83.

Hays v. Hays, 1 Humphr. (Tenn.), 402 (defendant's brief, page 20), was decided in 1839, and,

being a slander case, is not an authority here. It holds that a declaration on the words, "You have killed one negro and nearly killed another" is good on demurrer.

Commercial Publishing Co. v. Smith, 149 Fed., 704 (page 20 of defendant's brief): In that case there was a special plea admitting the publication complained of, and alleging that it was published on the strength of the sheriff's that the plaintiff, whom he had arrested, was guilty of a certain murder; that the substance of the publication was that the plaintiff had claimed when arrested, that he was not guilty of murder but did not deny he was the man wanted. An examination of the portion of that article quoted by defendant in its brief (pp. 20 and 21) will disclose why the court held the words susceptible of double meaning.

Whitley v. Newman, 70 S. E., 686 (page 22 of defendant's brief): This was another *slander* case in which the words complained of were spoken to plaintiff's wife. The petition was dismissed on demurrer, and on appeal that action was affirmed.

III.

Morse v. Printing Co., 124 Ia., 707 (page 26 of defendant's brief): This was a case where the alleged libelous article had been copied by defendant from another paper and proper credit given; but defendant had added certain comments of his own. The court held that the article in ques-

tion was designed and well calculated to exhibit the plaintiff as a shallow, ridiculous, and contemptible person, dishonest, undeserving of confidence; and that such a publication is libelous *per se* in law no less than is a written charge involving crime or moral turpitude. It was further definitely held that it is no defense in this class of cases to show that such articles were copied from other newspapers, although such fact may be considered in mitigation of damages, if pleaded for that purpose, but is never a bar to plaintiff's action.

Sheibley v. Ashton, 130 Ia., 195 (page 26 of defendant's brief): The sentence omitted from plaintiff's quotation, as indicated by the asterisks therein, is: "It is not necessarily what the defendant intended to express, but the meaning which he intended others to believe him to have is important."

Line v. Spies, cited by defendant as being reported in 192 Mich., 484, is found in 139 Mich., 484 (page 26 of defendant's brief): It is a *slander* case which holds merely that the time, place, and circumstances of the utterance may be shown, and that a witness who heard the words spoken may be asked as to his understanding of them, and what he thought the speaker meant.

Williams v. Cawley, 18 Ala., 206 (page 26 of the defendant's brief): This is another *slander* case holding that the time, place and circumstances of the utterance may be shown to determine their meaning. It indicates there was evidence tending to establish that the defendant, at the time he

ttered the words, explained that they had ref-
rence to an illegal allowance of money, which
ould show that he did not mean to charge a theft.

Bettner v. Holt, 70 Calif., 270 (page 26 of de-
endant's brief): This is another case which
mply states the law permitting the showing of
ie circumstances surrounding the utterance of
ie slander.

Rex v. Horne, 2 Cowp., 672 (page 27 of defen-
ant's brief): This was a criminal action for
beling the King, prosecuted on information, and
was charged that defendant prepared and pub-
shed certain affidavits casting aspersions upon
ie King's troops. Defendant called a witness,
howed him a copy of the Advertiser in which an
ffidavit had been published, and the witness testi-
ed to the publication. Held that as a defense to
ie charge of criminal libel defendant was entitled
o every technicality, and that the evidence was
dmissible.

Pfister v. Press Publishing Co., 139 Wis., 627
defendant's brief, page 27): The answer of the
efendant was in part that the Sentinel, owned
y plaintiff, had published a similar article, and
hat like items had appeared in all Milwaukee pa-
ers, and the Chicago papers circulating in Mil-
aukee. A motion to strike out the answer was
ustained, and, being assigned as error, it was
eld on appeal that the action was proper; that
vidence of this kind cannot be received either in
eduction or mitigation of damages.

McCormick v. Sweeney, 40 N. E., 114 (page 27

of defendant's brief): This is another *slander* action in which plaintiff had been charged with robbery "in the presence of W. and divers other persons." Held that an answer that the words were not so understood by W. is demurrable, since they may have been so understood by the "divers other persons;" also that it is error to overrule a demurrer to an insufficient paragraph of an answer, though the facts therein alleged were provable under the general issue, which was pleaded.

Taylor v. Bond, 88 N. E., 311 (defendant's brief, page 28): This is another *slander* case holding that in an action imputing a charge of larceny an answer is sufficient which alleges that plaintiff and all persons hearing the words were familiar with the subject-matter of the conversation; and that the words were a characterization of the plaintiff's conduct with respect to a known transaction, and not understood by them, the hearers, as charging the plaintiff with being a thief or guilty of larceny.

Berea College, 77 S. W., 381 (page 28 of defendant's brief): Petition in *slander* alleged the publication of a statement that certain persons would testify in the case of the plaintiff for burning a school house. The answer pleaded a rumor that plaintiff had burned the school for a certain reason, and that the publication was made under the impression that he would be charged with the burning. Held, that the answer made the petition good.

Fry v. Bennett, 28 N. Y., 324 (page 28 of the

defendant's brief): This is on the subject of damages, and has this to say: "The editor and proprietor of the newspaper is presumed to have knowledge of its contents."

The cases cited on pages 29 and 30 of the defendant's brief are "retraction" cases and, of course, have no bearing upon the questions here involved.

The case of *Davis v. Coblentz*, 174 U. S., 719 (page 32 of defendant's brief) has no bearing here, because the trial court submitted to the jury the credibility of the witnesses, and the weight to be given their testimony, in the language appearing on page 47 of the Record.

Kovacs v. Moyoras, 175 Mich., 582 (page 35 of the defendant's brief): Here the defendant pleaded the general issue, and, according to the Michigan practice "gave notice" that he would upon the trial insist and give evidence that the article as printed and published in the newspaper mentioned was true. The decision was on the error regarding the trial court's permitting a witness, over objection, to testify on rebuttal as to the general reputation of the plaintiff in the community where he lived. It was not squarely on the question of the plaintiff's right to give such evidence as a part of his case in chief.

Hitchcock v. Moore, 70 Mich., 112 (page 35 of defendant's brief): This is another *slander* in which the plea was the general issue, and the real question decided was that, when defendant was asked on cross-examination questions which tend-

ed to impeach his reputation, he may not, on the strength of the cross-examination, as part of his case in chief, give evidence of his reputation.

Wasson v. Canfield, 6 Blackf., 405 (page 35 of defendant's brief): This was a *slander* case, and was reversed on appeal for error excluding evidence for the defendant that plaintiff's character was bad, the court saying it was admissible on the general issue, notwithstanding the plea of justification. The court expressed the view, but did not in that case decide that plaintiff could not, as part of his case in chief, give evidence of his general reputation.

Dame v. Kenney, 25 N. H., 318 (decided in 1855, page 35 of defendant's brief): This was another *slander* case in which the general issue was pleaded. The case turned upon the question of whether the defendant should be permitted to prove general suspicions in mitigation of damages; and, while the question of plaintiff's right to prove his character before it was attacked was discussed, it was unnecessary to the decision of that case.

THE WRIT OF ERROR SHOULD BE DISMISSED.

POINT NO. 1.

There was evidence proper to be submitted to the jury in support of the plaintiff's case; and, the jury's verdict having been sustained by the lower courts, the same will not be here disturbed.

The plaintiff sustained the allegations of his declaration to the satisfaction of the jury, by the competent testimony of himself and several witnesses; and, their verdict having been concurred in by the two lower courts, the same should not be disturbed.

The foregoing contention is sustained by the following decisions of this Honorable Court:

In *Standard Oil Company v. Brown*, 218 U. S., 78, it was held—

> "The facts, and the conclusions to be drawn from them, are for the jury, and cannot be reviewed by the Federal Supreme Court upon writ of error."

Herencia v. Guzman, 219 U. S., 44:

> "The objection that the verdict in a negligence action was against the weight of the evidence, and that the damages allowed were excessive, cannot be considered by the Federal Supreme Court on a writ of error, where there is evidence proper for the consideration of the jury."

McCabe & S. Constr. Co. v. Wilson, 209 U. S., 275:

> "A verdict finding that a construction company was guilty of negligence toward a locomotive fireman in its employ who was injured by the giving way of a pile bridge

during high water, will not be disturbed by the Federal Supreme Court, where it has been approved by both the trial and territorial supreme courts, and there was evidence that the bridge had once before given way in time of high water, and was rebuilt without change of plan."

POINT NO. 2

There is no question of general public importance involved here; and a review of the record by this Honorable Court clearly is unnecessary to secure uniformity of decisions, for no conflict of decisions is shown to exist.

The defendant has not, we respectfully submit, made any showing of necessity for the review of this case to secure uniformity of decisions. The Federal authorities are in entire harmony on all the points here involved; and careful analysis and an avoidance of the misapprehension of the State decisions will show there is no conflict even with the State courts. (See also Point 4, *infra*, for authorities.)

POINT NO. 3

The Court of Appeals has twice held the words sued on libelous *per se;* and, in the state of the record (no competent evidence having been offered by defendant) the case was properly submitted to the jury.

Upon the state of the record in this case, the merits, we earnestly contend, are with the plaintiff. He pleaded what he expected to prove—injury to his standing, good name, fame, credit, and esteem; that the words sued on amounted to charging him with murder—and, by the testimony of himself and several witnesses, sustained the burdens thus assumed to the satisfaction of the jury. (See also Point No. 4, *infra.*) The defendant, although he assumed the burden of proving justification (which according to many authorities amounted to a republication of the libel), abandoned the same without producing any competent evidence to match or overcome the plaintiff's case. We submit, therefore, that the verdict of the jury, returned on plaintiff's uncontradicted and unshaken case in chief, should stand.

In *Green County v. Thomas*, 211 U. S., 598, this Honorable Court held:

> "The scope of review on certiorari will not be broadened so as to include, in addition to the questions which the petitioner has properly raised, technical questions tending to embarrass the progress and delay the final ending of an action, the merits of which are with the respondents."

In connection with the statement made in the main part of our brief that defendant did not urge in the Court of Appeals its assignment of error No. 13 (relative to the supposed error of the trial

court in refusing to direct a verdict for defendant at the close of the whole case), we may add that the subject was not referred to in the petition for the writ of certiorari. Furthermore, as already stated in this brief, that contention which is now urged here throughout eight pages of defendant's brief as "the first and fundamental proposition to be considered" is inconsistent with the proposition covered by Assignments of Error 14 and 15.

In the case of *Great Northern Railroad Co. v. United States*, 208 U. S., 452, it was held that—

> "An objection to the sufficiency of an indictment will not be considered by the Federal Supreme Court on certiorari, although the grounds of the demurrer and the general language of the exception taken on the trial are broad enough to embrace such objection, where the conduct of counsel for the accused in the courts below is wholly inconsistent with any intention to rely upon such objection, and the point was not referred to in the petition for writ of certiorari, or in the brief submitted in support of that petition."

Not only was the refusal of the trial court to direct a verdict not referred to in the petition for certiorari or brief in support; but the record (p. 44) will show the ground of the motion was to the effect that the article sued on was not *susceptible* of the meaning attributed to it, and yet, an

examination of pages 8 and 9 defendant's brief filed in support of the granted writ of certiorari, will show an apparent attempt to add a further ground to said motion, namely, that "no extraneous evidence was introduced that would supply this defect in plaintiff's case and make it (the article) possible to be construed as libelous." We submit the question saved by Assignment of Error No. 13 has been waived by the conduct of counsel for defendant, and the same ought not to be considered.

POINT NO. 4.

The questions raised on this record are foreclosed, so far as certiorari to review the same here is concerned, by former libel cases.

Substantially every question here raised has heretofore been presented to and passed upon by this Honorable Court in cases wherein petitions for certiorari have been denied.

In the case of *Press Publishing Co. v. McDonald*, 63 Fed., 238, certiorari (No. 1012) denied 163 U. S., 700, on May 25, 1906, plaintiff produced a witness who was permitted to testify in plaintiff's case in chief that the plaintiff's position socially and in a business way is the highest in the community—Cincinnati and New York, and that his character is of the best." The plaintiff was also permitted to give in minute detail his social and business activities and connections. The evidence was duly objected to and exception taken,

and it was insisted, in support of the petition for certiorari, that the plaintiff should not have been permitted to prove his social standing in any event. Furthermore, the petition contended that the article sued on was not libelous, and that there was insufficient proof at the trial to take the case to the jury.

In the case of *New York Evening Journal v. Simon*, 147 Fed., 224, certiorari (No. 441) denied October 15, 1906, 203 U. S., 589, the plaintiff, a sea captain, sued for libel, charging him with disregarding in mid-ocean a distress signal from a bark and leaving its captain and crew to their fate. On the trial the court admitted as part of the plaintiff's case in chief this testimony:

> Q. Do you know what his reputation was as to ability and competency as a naval captain?
>
> A. (Received under exception.) The captain was considered one of the most expert captains we had; he had not been known to have ever had an accident.
>
> Mr. Pinney: I move to strike that last part out.
>
> The Court: Strike that out; just state in general terms what his general reputation was.
>
> A. Well, he stood very high in the company, and the company gave him the command of the L'Aquitaine, which was put on the line, because he was practically the

most efficient captain we had beside—

The Court: That is enough; the substance is, his reputation is very high, and I suppose you mean to say as an officer and as a man.

Witness: Yes, sir; for that reason they gave him the steamer.

In that case defendant urged that the case of *Press Publishing Co. v. McDonald, supra,* had created a conflict of authority between the different circuit courts of the United States so great as to justify final settlement by the highest authority. It was also sought to distinguish the Simon case from the McDonald case because the latter referred to "general social standing" rather than to "general reputation."

In the case of *Morgan v. Halberstadt*, 60 Fed., 592, Certiorari (No. 1198), denied 154 U. S., 511, the defendant was a member of an unincorporated association, and on the trial of the suit for libel, it was objected that the trial court could not, under the Constitution, require a witness named Jones, another member of said association, to testify concerning the publication of the libel on the theory that he might incriminate himself. The "constitutional" question urged in support of the petition for certiorari was of the "greatest importance." The answer to the petition for libel in that case set up justification; answer to the petition for certiorari contended that no constitutional question was raised and, the plea of justifi-

cation having failed, "both at large and in detail, and this case having gone to the jury as of necessity, without a particle of proof in substantiation of the alleged defenses of the New York Times," the petition should be denied. There was a verdict in the latter case for $15,000.

Having, as we believe, answered every point and proposition advanced by defendant's counsel in their brief, we respectfully submit that the Writ of Certiorari in this case should be dismissed.

E. F. COLLADAY,
H. S. BARGER,
Attorneys for Respondent.

SIDNEY J. DUDLEY,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

THE WASHINGTON POST COMPANY,
Petitioner,

vs.

JOHN A. CHALONER, *Respondent.*

SUPPLEMENTAL BRIEF FOR RESPONDENT

This supplemental brief, filed with leave of Court, is directed only to the further discussion of the question whether the words *"shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home,"* are libelous *per se* in that they charge the plaintiff with having committed the crime of murder in one of its degrees, as alleged in the declaration.

ARGUMENT.

We respectfully submit that the words in and of themselves are sufficient to charge the plaintiff with murder in either the first or second degree, within the meaning not only of the law of the State of Virginia, where the libelous article states the crime was committed, and of the law of the District of Columbia, where the article was published, but within the meaning of the law of other jurisdictions where the publication was circulated as well.

In other words, our contention is that the circumstances of the killing of Gillard, as the same are contained in the article itself, are such as to cause those persons who saw the article to believe that the killing of Gillard was felonious. We assume that the principle which prohibits the taking into consideration of matters *de hors* the article itself, in determining the actionable quality of the words, is too well-settled to require the citation of authorities; and that, unless the article itself contains such explanatory matters or statements of circumstances surrounding the killing as will show the charge is not a criminal one, then the words are actionable *per se*. It is also well settled that, to render a publication libelous *per se*, it is not necessary that the article complained of shall charge a crime or offense with the same particularity as is required in indictments.

The Virginia Code (Vol. 2, 1904 Ed., Annotated), sec. 3662, provides that the killing of a

human being by poison, lying in wait, imprisonment, or starvation, or any wilful, deliberate, and premeditated killing, or a killing in the commission of, or attempt to commit arson, rape, robbery, or burglary, is murder in the first degree; and that "all other murder is murder in the second degree." Likewise, the Code of Law for the District of Columbia, sections 798-800, provides that whoever kills another with malice aforethought, except in such circumstances as amount to first degree murder, shall be guilty of murder in the second degree. The common-law definition of manslaughter obtains in both the State of Virginia and the District of Columbia. So far as we are aware, while the crime of manslaughter has nothing to do with this case, the majority of other jurisdictions follow the common-law definition of manslaughter, whether the same is enacted into written law or not.

Bristow's case, 15 Gratt. (Va.), 642, holds that if a killing be malicious, and not wilful, deliberate, and premeditated, it is murder in the second degree.

Johnson's case, 5 Gratt. (Va.), 660, holds that a person neither assaulted nor threatened, who gets down from his horse, arms himself with a club, and interposes between two other persons who are about to engage in a fight, and kills one of them, is guilty of murder in the second degree. In line with *Johnson's case*, we submit that the article published in the "Post" charged Chaloner with nothing short of interposing himself between

Gillard and his wife, while the former was *abusing* the latter, who had taken refuge at Merry Mills, Chaloner's home, and with killing the husband as a result of that interposition of himself into their affairs. Giving to the article here under consideration the construction most favorable to defendant, it does nothing less than charge that Chaloner on the occasion therein mentioned, intermeddled between husband and wife while the latter was being abused by the former; and, without showing that such intermeddling was justifiable, the article charges that Chaloner shot and killed Gillard. Conceding, for the sake of argument, that many people would say in their own minds that Gillard received his just dues—that he should have been killed for abusing his wife; yet it seems too clear to merit serious argument, that a vast majority of people, people of ordinary intelligence and learning, would know that, as a matter of law, Chaloner would have been justified in killing Gillard only for two reasons—namely: (1) to save Mrs. Gillard's life if it were in imminent danger of being destroyed by her husband; or (2) to save his own life when and if he were being attacked under such circumstances as clearly to indicate that he was about to be killed by Gillard. No such circumstances of justification are to be found in the article here under consideration.

The fact of killing is *prima facie* evidence of malice, and, unless overcome by a preponderance of evidence, it must be held to be murder. This

proposition is sustained by the following and many other authorities:

Commonwealth v. York, 43 Am. Dec. (Mass.), 373.
Lewis' Case, 78 Va., 733.
Hill's Case, 2 Gratt. (Va.), 599.
Bristow's Case, 15 Gratt. (Va.), 639.
McDaniel's Case, 77 Va., 381.
Tilley's Case, 89 Va., 151.
Longley's Case, 99 Va., 807.
McWhirt's Case, 3 Gratt. (Va.), 594.
Coffee v. State, 24 Am. Dec., 570.
State v. Anderson, 5 Am. Dec., 648.
Pa. v. Bell, 1 Am. Dec., 298.

In *McWhirt's Case, supra*, it is held that—

> "All homicide is in presumption of law malicious; and, of course, amounts to *murder*, unless justified, excused, or alleviated; and it is incumbent upon the prisoner to make out to the satisfaction of the court and jury the circumstances of justification, excuse, and alleviation."

McWhirt's Case cites 4 *Blackstone's Commentaries*, 201, and other cases to the same point.

The killing of Gillard by Chaloner was, in presumption of law, malicious and amounted, therefore, to murder; and a newspaper article relating to the same is libelous *per se* unless the article in

and of itself shows that the killing was justified, excused, or alleviated. The charge contained in the article under consideration was sufficient, if the same were true, to subject Chaloner to an indictment, trial, and conviction for murder. The article charges merely that Chaloner "shot and killed John Gillard while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home." The article states neither the form of the abuse Mrs. Gillard was receiving, nor the reason for her having sought refuge at Merry Mills.

To say that one man has killed another certainly states that a homicide has been committed; and, adding to the foregoing authorities, and applying the language of the court in the case of *Taylor v. Casey*, 1 Minor (Ala.), 258, to the case at bar, we submit that "*Every homicide is judicially, as well as to the common apprehension of mankind, deemed felonious unless the circumstances of justification appear.*"

During the argument at bar it was insisted by counsel for defendant that Mrs. Chaloner had fled to and taken refuge at Merry Mills, Chaloner's home, to escape from her brutal husband; and that he had followed her there and renewed his attack upon her. The article itself does not show that, as clearly appears; but, assuming for the mere sake of argument that it did so state—that she had fled to Chaloner's home and taken refuge to escape physical punishment, or through fear that a previous threat to kill her would be carried out

—the article would yet fall short of showing that the killing of Gillard was justifiable, because, as aforesaid, Chaloner would have been justified in killing Gillard only under circumstances indicating to reasonable men that Mrs. Gillard's life was in imminent danger, or that Chaloner's life was at stake. No such excuse appears in the article, and, in fact, it does not even appear in the slightest degree that the killing was necessary to save anybody's life.

It was further stated during argument that the declaration shows the reason for Mrs. Gillard having taken refuge at Merry Mills; but an inspection of the Record will disclose (see page 3) that the declaration contains no such averment. On the contrary, it plainly says that the killing was caused by the accidental explosion of a pistol in the hands of Gillard and Chaloner at the time.

In order to have justified Chaloner in killing Gillard, there must have been then and there some overt act upon the part of Gillard, such as would have left no doubt in the mind of Chaloner as to Gillard's intention to kill his wife. The article not only fails to show such an overt act, but it contains nothing whatever to indicate to the reading public that Chaloner had even the slightest suspicion that Gillard intended to kill his wife or to commit any other felony. No circumstances of justification, excuse, or alleviation appearing in the article itself, we earnestly submit that but one conclusion can be drawn from the words used, namely, that they charge Chaloner with the crime of murder in one of its degrees.

In *Stoneman's Case*, 25 Gratt. (Va.), 887, it was held that—

> The bare fear that a man intends to commit murder or other atrocious felony, however well grounded, unless accompanied by an overt act indicative of such intention, will not warrant killing a party to prevent a crime. There must be some overt act indicative of imminent danger at the time.

In the *Stoneman Case* the trial court instructed the jury that there must have been an overt act to justify the killing, and that mere belief or suspicion, from threats, was not enough. The Supreme Court of Appeals of Virginia upheld the instruction on appeal, and sustained the conviction of murder in the second degree. The defendant in that case had killed the divorced husband of his sister, upon the fear or suspicion, based on threats and actions, that the husband intended to do harm to the defendant, some member of his family, or his property, and the killing occurred near the defendant's home.

The article here charges Chaloner with nothing more than intruding himself into a domestic difficulty between husband and wife, and killing the husband without justification; hence, the law implies malice and makes the killing, until explained, murder at least in the second degree. The article would be so understood by the reading public, or at least by a large part of it.

AS TO ARGUMENT OF DEFENDANT'S COUNSEL.

During the argument of counsel for the defendant it was contended that, while the word *abusing* may have two meanings, yet the clause, "who had taken refuge at Merry Mills, Chaloner's home," when taken in connection with the word "abusing" is enough to rebut the implication of murder. The contention of counsel that the words are not libelous *per se* was expressed in part as follows:

> "A wife does not take refuge in a neighbor's house from a tongue lasher; a wife does not flee from her home with her children to escape merely the verbal abuse of her husband. The fact that she had fled into Chaloner's home as a refuge from a brutal husband means, according to all of the common-sense understanding of the terms, that she was fleeing from violence, either actually perpetrated, or attempted, or threatened."

> "* * * if I would read an article describing how a man had killed another man, the other man having followed his wife into the neighbor's home for refuge, for protection, would I think that man a murderer? Oh, no. * * *."

We answer merely by soliciting attention to the fact that the article contains nothing whatever to show why Mrs. Gillard had taken refuge at the Merry Mills; that she had fled there with her children; that she had fled there for refuge from a brutal husband; that her husband followed her there; or that there had been any prior abuse, ill treatment or threats causing her to go. The article as it stands is what must be considered in determining its actionable qualities; not matters *de hors* the publication itself.

During the course of argument, counsel further said—

> "An American man who would not protect the fleeing, cringing woman, from her brutal husband, ought not to be, and would not be, respected by any man of spirit."

The article under consideration says nothing about a "fleeing, cringing woman or a brutal husband."

Counsel further contended that Gillard was a mere trespasser, having gone to Chaloner's home in pursuit of his wife. The article in question shows no pursuit of the wife by the husband; but, if it did, as suggested by the question of a member of the Court to counsel, a mere trespass by Gillard would not have warranted Chaloner in killing him. The taking of Gillard's life was justifiable or excusable only for the purpose of saving the life of his wife or in the necessary protection of the life of Chaloner himself. Any killing under the bare

circumstances stated by this article would be murder in either the first or second degree, because those circumstances are not enough to rebut the implication of malice.

It was further argued by counsel for defendant that Chaloner, under the circumstances stated in the article, would have been justified in doing to Gillard anything his wife would have been justified in doing. Bearing in mind that there is nothing in the article to show the precise form of abuse which Mrs. Gillard was receiving, even a killing by her, for all the language of the article shows, would have been murder in the second degree, within the cases heretofore cited. In the case of *Allen v. United States*, 164 U. S., 492, it is held that, "Mere provocative words, however aggravating, are not sufficient to reduce a crime from murder to manslaughter, and that the intent necessary to constitute malice aforethought need not have existed for any particular time before the killing, but that it may spring up at the instant, and be inferred from the fact of killing."

(See also page 17 of our main brief.)

We earnestly contend that the Writ of Certiorari herein should be dismissed.

Respectfully submitted,

E. F. COLLADAY,
SIDNEY J. DUDLEY,
H. S. BARGER,
Attorneys for Respondent.

IN THE SUPREME COURT OF THE U. S.

OCTOBER TERM, 1918.

316.

THE WASHINGTON POST COMPANY,
Petitioner,
vs.
JOHN ARMSTRONG CHALONER.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

and

DISCUSSION OF MATTERS OF FACT IN BRIEF FOR PETITIONER.

The eminent counsel for the Petitioner (hereinafter referred to as defendant) have attempted to confuse this learned Court, and obscure the issues, as follows:

Said eminent counsel, out of whole cloth, and in the teeth of the evidence, attempt to injure the

character of Respondent (hereinafter called plaintiff) by attempting to destroy his character for veracity, by attempting to make out that plaintiff swore falsely while on the stand in two specific instances—one relative to the direction in which the revolver was pointing when plaintiff was holding same and before Gillard had seized same and pointed same at Gillard's wife and child—the other relative to plaintiff's carrying said revolver out of doors—plaintiff having sworn that plaintiff did *not* carry said revolver out of doors.

Said eminent counsel further attempt to injure the character of plaintiff for peace and good order by making use of the following, which we shall prove to be, scandalously false phrase, to-wit, folio 27, page 28, Record: "* * * with reference to his (plaintiff's) conduct around the neighborhood in which he lives, relative to escapades and episodes of shooting up automobilists and automobile travelers, and getting notorious in the papers in that connection, something like a year ago." There not being one solitary word of truth therein relative to the alleged "shooting up" of automobilists and automobile travelers. And the only truth there is, in the phrase, "escapades and episodes," is the truth which can be found in describing an act which met with the State-wide approbation of the newspapers as an act fully in support of the State law governing automobilists, in defence of the humble against the strong, and one which others would do well to follow, and the only truth there is in the phrase "escapades and

episodes," aforesaid, is the truth which can be found in describing such an act as an "escapade."

Lastly, said eminent counsel attempt to obscure the lucid and profound opinions of the learned Mr. Justice Stafford, and of the learned Mr. Justice Van Orsdel by means of the most bare-faced and fallacious, sophistical word-juggling.

For instance, said eminent counsel say (page 20, Petition), "The trial Court (R. p. 47) instructed the jury that 'the defendant has a right to have you consider the circumstances if in any degree they tend to mitigate the damages.' This charge, however, was without benefit to the petitioner, when the mitigating circumstances had not been permitted to be shown." Now let us turn, we respectfully submit, to the language of the learned Justice which formed the basis of his said charge to the jury.

(R. p. 43): "The Court * * * The only question now is—" Mr. Lambert (interrupting): "On the general issue." The Court: "Of course, under the general issue you can show in mitigation of damages various things. *I understand what did occur has been shown. That* may be used in *mitigation.* Suppose the article were made up out of the whole cloth. It would be a different case from what did occur. What did occur has been shown by the plaintiff himself. That can be used in mitigation, I suppose."

Turning back now to the defendant's version of Mr. Justice Stafford's plain language afore-

said, the only possible inference—we respectfully submit—from the defendant's said language, to-wit: "This charge, however, was without benefit to the petitioner, when the mitigating circumstances had not been permitted to be shown"—the only possible inference to be drawn from the defendant's said language is that Mr. Justice Stafford had said: *First*, that there *were* mitigating circumstances; *second*, had said that said mitigating circumstances would not be permitted to be shown. Whereas the learned Justice's language was as follows, aforesaid, *supra:* "The defendant has a right to have you consider the circumstances, *if* in any degree they tend to mitigate the damages," which, on the inherent evidence of the entire above-cited context means, we respectfully submit, "the defendant has a right to have you consider the circumstances, *and determine* if in any degree they tend to mitigate the damages." The sentence, we respectfully submit, is a perfectly plain, lucid sentence, elliptical in nature, and that is all.

So much for the attempt of said eminent counsel to obscure the words of Mr. Justice Stafford.

We now approach the attempt of said eminent gentlemen to obscure the language of Mr. Justice Van Orsdel. As regarded Mr. Justice Stafford, said eminent gentlemen merely attempted to beg the question—merely attempted an *argumentum ad hominem*, before this learned Court; whereas, as regarded Mr. Justice Van Orsdel, said eminent gentlemen attempted something even

more daring, to-wit: Said eminent counsel boldly say (Pet. pp. 4-5) as follows: "On appeal the Court of Appeals of this District reversed this ruling in an opinion which is susceptible of two constructions:

"(1) That the demurrer admitted the construction placed upon the article by the plaintiff, namely, that the words 'charged the crime of murder,' and therefore, admitting that construction the demurrer could not be sustained, and

"(2) That the article was at least susceptible of a libelous interpretation and should therefore be submitted to the jury." (36 App. D. C., 231.)

Now, we respectfully submit, let us turn to the exact words of the learned Mr. Justice Van Orsdel. To-wit (*Ibid.*, p. 8):

> "We are of the opinion that the qualifying words here used are not sufficient to remove the reasonable inference that the crime of murder had been committed. Conceding, however, that the reasonable inference to be drawn from the words themselves is doubtful, the question is still one for the jury."

We respectfully submit, that every school boy knows that the word "conceding" is an elliptical, terse manner of saying "but, granting, for the sake of argument." Applying said construction to the context we get as follows: "But, granting for the sake of argument, that the reasonable in-

ference to be drawn from the words themselves is doubtful, the question is still one for the jury." How startlingly different that sounds—we respectfully submit—from the construction placed thereon by the eminent counsel aforesaid, to-wit: "That the article was at least susceptible of a libelous interpretation and should therefore be submitted to the jury."

Furthermore. To put any such construction upon it would, we respectfully submit, do nothing less than *stultify* the said lucid opinion of the learned Justice. For it would put the learned Justice in the position of breaking that primary rule of logic which says that "*a thing cannot both be and not be.*"

To accentuate this, let us place side by side what the learned Justice *said* in the *first* of the said two sentences; and what the said eminent counsel *say* he said, in the *second* of the said two sentences. To-wit: "We are of opinion that the qualifying words here used are not sufficient to remove the reasonable inference that the crime of murder had been committed. The article was at least susceptible of a libelous interpretation and should therefore be submitted to the jury."

Reverting now in detail to the attempt of said eminent counsel to injure plaintiff's character by attempting to destroy plaintiff's character for veracity, by attempting to make out that plaintiff swore falsely while on the stand in two specific instances, one relative to the direction in which the revolver was pointing, when plaintiff was

holding same, and before Gillard had seized same, and pointed same at Gillard's wife and child—the other relative to plaintiff's carrying said revolver out of doors, plaintiff having sworn that plaintiff did *not* carry said revolver out of doors.

Taking up first the question of the direction of the said revolver.

The only two witnesses, in the premises, to-wit, Ernle George Money, plaintiff's agent, and John Grady, colored, plaintiff's body-servant, bear out plaintiff's sworn statement that when he fought Gillard away from Gillard's wife plaintiff only employed Nature's weapons, since both said witnesses testified to plaintiff's being without a revolver in his hand or visible anywhere when each entered the dining room at "The Merry Mills," Cobham, Virginia, on the afternoon of March 15th, 1909. Both bore out plaintiff's sworn statement that Gillard had knocked him down with heavy iron tongs near at hand, and that plaintiff was in the act of rising from the floor as they simultaneously entered the room, or very nearly so. In only one material point did said two witnesses differ, and said point was relative to the direction in which the revolver—later drawn by plaintiff to intimidate Gillard—when Gillard and Money were engaged in a life-and-death struggle—was pointing. Money agreed with plaintiff that the said weapon was pointing away from Gillard, while the negro held otherwise. We respectfully submit that the cause for said divergent testimony is shown in the record. The record shows that neither

plaintiff nor Money were excited. *While the Record shows that the negro admits that he was.* Citing now from the Record: Said John Grady, on the stand (R. p. 13): "Mr. Money went into the dining-room on one side and I on the other. Mr. Money taken hold of Mr. Gillard, Mrs. Gillard lying kneeling down on the floor, moaning and groaning. Mr. Chaloner was getting up from the floor, with his hand on the back of his head, in his stocking feet. Then Mr. Chaloner walked towards Mr. Gillard, after getting up out of the corner, saying to Mr. Gillard, 'You be quiet. You be quiet. I am not going to hurt you, and see that you don't hurt anyone.' Mr. Gillard said, 'That's all right.' Then Mr. Chaloner taken his revolver out of his hind pocket, walking towards Mr. Gillard, taking his hand off the muzzle, saying: 'I am not going to shoot you. I am not going to shoot you. You be quiet.' And Mr. Chaloner told me to go out and get the men on the place. I told him there were no men there, they were all out." Witness further testified that Mr. Chaloner wanted the men to give help in the dining-room; Mr. Chaloner then told him to get a rope out of the guest chamber and tie up Gillard, and send him to Charlottesville, and have him sent to jail. On cross-examination the witness was asked (R. p. 14), "When you came in there with the rope how far did you get into the room before you saw what the situation was?" And answered: "Right at the door." Mr. Chaloner was standing up about three or four feet from Gillard; did not see the pistol at that time; did not

see the pistol in either one of Mr. Chaloner's hands; saw it before he went out of the dining-room, in Mr. Chaloner's hand; saw Chaloner draw it out of his right hip-pocket; Mr. Chaloner had the pistol in his hand when witness went out under instructions to get a rope, and was shaking it in his hand, and told Gillard he was not going to shoot him; the barrel was towards Gillard; does not remember next seeing it; *was excited* when he saw Gillard on the floor apparently dead."

The said witness, Ernle George Money, next described what he saw upon entering the said dining room upon said occasion. (R. p. 15.) "Mr. Chaloner was on his knees like this (illustrating). He had one hand on the top of his head, and his other hand he had reached out this way (illustrating). Mr. Gillard was about the same distance between the two parties (Mrs. Gillard and Chaloner), he could have struck either one or the other. * * * Mr. Chaloner (R. p. 16), in the meantime, had risen, and was standing some distance off. He had a little pistol in his hand. While I was scuffling with Gillard, Mr. Chaloner said: 'Now, Gillard, you keep quiet; we are not going to hurt you, but we are going to see that you do not hurt anyone yourself. I am going to have you tied, and I am going to put you in a wagon and send you up to Charlottesville by some of my men, to be put in jail and sent to the penitentiary for beating your wife.' * * * Mr. Chaloner had the pistol in his hand, pointing away from Gillard, toward the south window. This little sideboard

was beyond the south window, and Mr. Chaloner had the pistol in two hands pointing away from Gillard." Finally, plaintiff on the stand said (R. p. 29): "John Grady was mistaken in stating that at the time he left the room plaintiff was standing about eighteen inches away from Gillard with the pistol pointing at him. He could not point the pistol at Gillard without wanting to kill him, and if he did he would have killed Money, too. It was a mistake upon the part of the negro. At the time John left the room the cheek of Money and the cheek of Gillard were together. Money's cheek was always cheek to cheek with Gillard. He rested his head on Gillard's shoulder side by side, the whole time. * * * He (plaintiff) had his finger of his right hand off the guard, outside the guard, straight, so that Gillard could see it. He had no intention of using the pistol. He wanted Gillard to stop. He knew he was a man of gigantic strength. He could carry enough railroad ties to cover the work of two men, and he did not know whether Money could account for him and was confident that Gillard would kill every man in the room if he made away with Money, he would make away with the plaintiff. He wanted to overawe Gillard, wanted him to cease his struggle and to see that he had a gun, and that he, Gillard, even if he overcame Money, would be 'held up' by plaintiff with the gun. Gillard did not know there was a gun in the house, and if he 'did Money up,' and got hold of the tongs, he would 'get' plaintiff. This was all to overawe him, let

him know he was 'up against' a gun, and discourage him. Plaintiff did not draw his pistol when he was fighting with Gillard because he felt capable of taking care of himself and did not want a pistol to take care of himself, only in extreme circumstances. * * * (R. p. 30) * * * did not draw his pistol when he was fighting Gillard, because he felt capable of taking care of himself and did not need a pistol, only in extraordinary circumstances; thought he was man enough to 'get away with it' when Gillard was knocking him down; that meant nothing to him."

Referring to the above incident Mr. Justice Stafford said in reply to defendant's counsel (R. p. 43):

> "The trouble is this is very prejudicial. It contains what purports to contradict the statement which the plaintiff made on the stand, that he was aiming at him at the time, which he denies now."
>
> Mr. Colladay: "We object also on the ground that this would tend to impeach Mr. Chaloner in a matter purporting to be uttered by him, and of which there is no competent evidence. This is not competent evidence of its having been uttered by him. It tends to contradict him in his own testimony, and a newspaper account of this sort cannot be used, either directly or indirectly, to contradict a witness. It is merely 'hearsay'."

Reverting now to said eminent counsel's second attempt aforesaid, to injure plaintiff's character by attempting to destroy plaintiff's character for veracity by attempting to make out that plaintiff swore falsely while on the stand, relative to plaintiff's carrying said revolver out of doors.

The plaintiff on the stand. (R. p. 24.) "Then when they were in that position, I for the first time drew my pistol out of my hind pocket. This pistol was a self-cocking 32, Smith & Wesson, which I had got in Philadelphia. I had this pistol all the time. I had this pistol since Thanksgiving, 1900, and my habit was to put this pistol in my pocket when at 'The Merry Mills,' in the house. I did not carry it out of doors, but in the house, for the reason that the house is very lonely. There are woods, and it is a quarter mile from any neighbor. I have only one servant, a colored man, and he was liable to go out with me when I went out, or go away on messages, and the house was left absolutely deserted. There was only one servant in it, and he was liable to go out with me, so I, being a rich man, and being more or less in the newspapers, knew that a burglar could find out about my place and look it up and break in on me and hide behind a door as I came in and hold me up and maybe do me up, beat me up. So I did not want to take that chance, and I always carried this in the house." * * * (R. p. 44.) "Thereupon the defendant * * * called as a witness the plaintiff * * *. The witness was then shown a photograph taken of himself in October, 1912,

on horseback at 'The Merry Mills,' on the lawn, within one hundred feet of the house, which he identified as that of himself. Thereupon the said photograph was offered in evidence, which said offer was objected to by counsel for the plaintiff * * * objection * * * sustained * * * exception * * * entered. It is agreed that said photograph may be produced at the hearing of this case on appeal and used in the same manner as if the same had been set out in this bill of exceptions."

When said photograph is shown said eminent counsel will be "Hoist by their own petard," as it were. As the palpable indisputable effort—on the evidence—of said eminent counsel is to attempt to confuse the issue and make out plaintiff perjurious in his statement under oath *that he did not carry the pistol he carried in the house out of doors.* Otherwise, why produce such a photograph at all? The reason therefore that said eminent counsel will inevitably be hoist by their own petard is, that the said photograph shows, instead of what the witness Money described as "a little pistol" (supra, R. p. 16) and which was shown in court at said trial to be a 32 calibre Smith & Wesson, said photograph shows an ivory-handled 44 calibre Colt "frontier" revolver—single action —a weapon out of all proportion larger than the 32 calibre Smith & Wesson. Lastly, the large Colt aforesaid is carried not—as was the little house pistol—concealed in the hip pocket, *but*

exposed—openly—in a large holster strapped to the rider's waist.

In conclusion, said eminent counsel further attempt to injure the character of plaintiff for peace and good order by making use of the following—which we shall prove to be—scandalously false phrase—to-wit, folio 27, page 28, Record: "* * * with reference to his (plaintiff's) conduct around the neighborhood in which he lives, relative to escapades and episodes of shooting up automobilists and automobile travellers, and getting notorious in the papers in that connection something like a year ago." There not being one solitary word of truth therein relative to the alleged "shooting up" of automobilists and automobile travellers. And the only truth there is in the phrase "escapades and episodes" is the truth which can be found in describing an act which met with the State-wide approbation of the newspapers as an act fully in support of the State law governing automobilists, in defence of the humble against the strong, and one which others would do well to follow—and the only truth there is in the phrase "escapades and episodes" aforesaid, is the truth which can be found in describing an act which met with State-wide approbation, as aforesaid, the truth which can be found in describing such an act as an "escapade."

In support of which we respectfully submit a considerable line of original newspaper articles —as they actually appeared in each paper—noticing favorably the above utterly foundationless al-

leged "shooting up of automobilists and automobile travellers."

Concluding this phase of the discussion.

With an audacity worthy of a better cause the eminent counsel for the defendant say as follows: (Petition, p. 16.)

> "Were the opinion of the Court of Appeals in this case permitted to stand, then all national newspapers having their publication or circulation in the District of Columbia would be repeatedly subjected to actions for libel whenever they referred to tragedies, and because the law is thus fixed by the Court of Appeals, would be mulcted in damages, although their purpose be absolutely innocent and the words used such as that the average reader could not believe that the crime of murder was charged. Hardly a day passes but what every newspaper in circulation in the District of Columbia and elsewhere refers to the fact that a man has shot and killed another. Under the ruling of the Court of Appeals, should that person sue the newspaper for libel the burden would be cast upon the newspaper to prove, by a preponderance of the evidence, that the plaintiff in fact committed the crime of murder in one of its degrees, although the circumstances of the killing were such as that, when shown, would be sufficient to establish that he com-

> mitted either justifiable or excusable homicide or the crime of manslaughter, for the plaintiff could content himself with the introduction of the article itself and the conclusive presumption of law that has been established by the opinion in that case, that the article charged him with the crime of murder. It irresistibly follows that this question is of great and general importance, and if left as it now stands, would induce a flood of litigation which would absolutely foreclose all newspapers published in this country which have a circulation in the national capital, from in any way referring to a tragedy unless it were prepared to establish that the party referred to was guilty of unlawful homicide with malice aforethought, either with or without premeditation, although that party, in fact, has been guilty of manslaughter, or had committed a justifiable or excusable homicide."

To which we content ourselves by replying as follows—in the learned words of Mr. Justice Van Orsdell, to-wit:

> "Our discussion may be prefaced by the suggestion that a strict rule of construction is to be applied where the libel consists of a printed publication. Society can in no way be benefited by the publication of

libelous matter. In view of the constitutional protection afforded a free press, publishers should be held to the highest accountability for unreliable publications or such as tend to impute to any person conduct that would render him liable to punishment or make him odious, infamous, or ridiculous. The parties under such circumstances are not dealing at arm's length. While the individual assailed is refuting the false charges to the person, the publication is reaching thousands, thus placing the helpless victim completely within the power of his traducer. So strict is the rule that a mere statement in a newspaper or publication that a person named is suspected of murder, that grounds for suspicion are said to exist, or that there is rumor of his confession, is actionable without even an allegation of special damages. Haynes v. Clinton Printing Co., 169 Mass., 512. With these well-established principles in view, we approach the consideration of the single question presented by this appeal."

Lastly—with an audacity which makes the former pale—the eminent counsel for the defendant say: (P. 22, Petition.)

"This case is the first in this jurisdiction, which changes the general rule heretofore

> always enforced, that in actions of slander and libel, the plaintiff may not introduce evidence of his general reputation of character unless or until the adverse party has introduced evidence attacking it."

To which we content ourselves by replying that the above statement upon the part of said eminent counsel is false, and challenge them to substantiate the same.

DISCUSSION OF MATTERS OF FACT IN BRIEF FOR PETITIONER.

In our answering brief we had occasion to draw this learned Court's attention to the unfortunate habit indulged in by the eminent counsel of the other side of attempting to tamper with the truth. Said unfortunate habit, like the malignant disease it is, has, we regret to state, made great strides in the brief filed by the distinguished practitioners, and to such an alarming degree that *no* false statement seems too atrocious to be uttered by them. No one has a higher regard for the honor and dignity of the learned profession of the law than ourselves, but when we are confronted by such a brazen indifference to the assassination of the majesty of Divine Truth, as that spread at large upon page after page of the brief of our distinguished adversaries, apparently in the desperate hope that we lacked either or both the courage and ability to nail each falsehood as it

showed its head—but when we are confronted by such brazen indifference to the divine majesty of the Truth, as is displayed upon page after page of the brief of our distinguished adversaries, nothing is left for us but to do our professional duty to our client and protect his interests from such unworthy assaults by fearlessly and frankly exposing same.

Our distinguished adversaries start out in their alleged so-called Statement of Case, page 2, with an utterly false statement, to-wit: Said distinguished gentlemen state as follows:

> "On March 15th, 1909, one John Gillard lost his life by a shot from a pistol *in the hands of the plaintiff*."

Whereas the truth is as vouched for by the verdict of the coroner's jury set forth by them. (Brief, p. 2):

> "The coroner's jury returned a verdict that Gillard came to his death by the accidental discharge of a revolver in the hands of himself and plaintiff, and while the latter was in good faith attempting to keep Gillard from shooting his wife."

Could anything be more outrageous, more brazen in the face of facts than the statement of our distinguished adversary, aforesaid, to-wit: "On March 15th, 1909, one John Gillard lost his

life by a shot from a pistol in the hands of the plaintiff?"

Before taking up the next batch of false statements upon the part of our distinguished adversaries, we should like to draw attention to the following, p. 11, *Ibid.*, wherein our distinguished opponents say as follows, to wit: "Therefore, viewing the publication in the case at bar * * * but pictures him as performing a laudable act in endeavoring to protect and save the life of one of the weaker sex."

The only trouble with the above hypothesis, we respectfully submit, is the trouble pointed out by the learned Court of Appeals (36 App. D. C., 23), p. 5, *Ibid.*, in which the learned Court says: "It is insisted by the counsel for the defendant that the statement in the publication that plaintiff killed John Gillard while the latter was abusing his wife is sufficient to convey the impression that the killing was justifiable. With this construction we do not agree. To charge another with the killing of a human being with no other words of limitation or qualification than are here used imports the commission of the crime of murder in one of its degrees." In support of the above conclusion by the learned Court of Appeals we respectfully submit the definition in the leading dictionaries —two published in this country; one published in Great Britain—as to the word "abuse." Said definitions show beyond a doubt that the word "abuse" is susceptible of two diametrically opposed and conflicting meanings, one having to do with *physi-*

cal abuse, the other with *mental* abuse. To wit: Webster's New International Dictionary thus defines "Abuse": "To use ill, to maltreat, to punish excessively, to hurt, physical ill treatment, to injure, revile, to reproach harshly." The New Standard Dictionary thus defines "Abuse": "To use improperly or excessively to put to bad use, ill treat, molest, oppress, to persecute, revile, to reproach coarsely, brutal treatment." Stormonth's Etymological Dictionary thus defines "Abuse": "To misuse, treat wrongly, to revile, employ bad language, to vilify, injure, maltreat."

Thus it clearly appears, we respectfully submit, that there is absolutely no guide to the newspaper reader upon coming upon the word "abuse" as used in the context, whereby the said newspaper reader may infer that Gillard was physically maltreating his wife, was beating his wife with a pair of iron tongs, rather than merely abusing his wife by reviling her, employing bad language towards her, vilifying her. Provided our reasoning is correct in the premises, what clearer case of murder in the first degree, what clearer case of premeditated deliberate murder could be imagined than that of Chaloner's killing Gillard simply because Gillard was employing bad language towards Mrs. Gillard for being found in another man's house?

To resume our examination of the tampering with the Record upon the part of our distinguished adversaries.

Said distinguished gentlemen say, page 6, *Ibid.*, "At the trial the plaintiff gave the following ver-

sion of the occurrence" (R. pp. 20-27). Whereas a reference to the said record proves that the said alleged "version" is no version at all. For instance, said gentlemen say, page 7, *Ibid.*, "Plaintiff caught Gillard by the scruff of the neck and pulled him away. A scuffle and fight ensued, in which Money participated." Whereas the Record shows, pp. 21, 22, 23, that Chaloner fought Gillard single-handed and alone, and, after dragging Gillard out of reach of his wife and beating her any more, Chaloner was knocked down in two consecutive attacks—two successive charges he made at Gillard—Chaloner was knocked senseless by two blows upon the head from the iron tongs in the hands of Gillard—and only as Chaloner was rising from the second said knock-down blow did Money enter the room.

Furthermore, the next statement in said brief is, p. 7, *Ibid.*, "John Grady also assisted in the effort to subdue Gillard, seizing his wrists and holding them." We respectfully submit that the above is, to say the least, misleading. Since Grady did not —*on the record*—participate in the contest—did not touch Gillard until Money had Gillard firmly held and sitting on his (Money's) lap, while Money was resting upon the small sideboard. (R. p. 24.) Then—and not till then—it was that Grady entered the struggle and seized Gillard's wrists directly from behind.

We now regretfully are forced to admit that we encounter an unqualifiedly false statement in said alleged "Statement of Case," to wit (p. 7,

Ibid.) : "*Plaintiff covered Gillard with the revolver* and had Grady find a rope with which to tie him." Whereas the truth is (R. p. 25) Chaloner said: "I took this" (pistol) "out, and the window was directly due south there. I took it out and held it in two hands and pointed out towards the window, and the reason was that when I talk I make gestures, and I was very much afraid that inadvertently I might point the pistol, in making a gesture like that, at Gillard, and that would mean pointing it at my friend, Col. Money, because his face was right beside Gillard's and Gillard was double-headed man at that time, and John Grady looming up in the distance behind. So I had every reason in the world to keep this self-cocking revolver pointing from this man; besides I am afraid of firearms in taking chances. So I anchored the pistol with my left hand so I could not, no matter how unsteady I was, make a gesture and discharge it. That is why I took hold of the barrel, and, as John said, carefully took hold of it."

The said misstatement is again repeated a few lines below, on the said page 7, as follows: "Plaintiff after first covering Gillard with the revolver."

The next misstatement is in the very next sentence, same page 7, ibid, to wit: "His (Chaloner's) interest, got the better of him, and he, unintentionally, stepped close to Gillard, who suddenly seized plaintiff's right hand with his left hand and swung the pistol around so that it pointed at Mrs. Gillard. Plaintiff swung it straight back instantly *and put his finger on the trigger.*" Be-

fore dissecting the above we should observe that careful as the Record is, there were several typographical errors surrounding the above statement. This learned Court will have observed that a dozen or more typographical errors have crept into the Record and have been detected and marked—italicized—by the editor. But there are several which are so subtle that it requires time and a thorough knowledge of the case to detect. Such are the following, to wit:

On page 23, R., it is stated by Chaloner as follows: "Col. Money, with extreme dexterity and generalship, twisted the tongs out of Gillard's right hand and with tremendous speed, turned and laid them on the bust of Mirabeau, and then caught Gillard from behind, pinioning his arms to his side and caught his forearms, leaving them free." A palpable typographical omission of the word "above" immediately before the words "his forearms," which would then read as follows: "caught *above* his forearms, leaving them free." For how otherwise *could* the forearms be free?

Furthermore, a second typographical error occurs in said connection—but three pages further on—to wit: On page 26, R., as follows: Chaloner is made to say by said typographical error, "After I had shown the three men that there was no danger from the pistol, I took my *right* hand off it and held it pointing straight to the ground." On the evidence of the context, "*right* hand" should be "*left* hand." For on p. 25, R., Chaloner said in the above connection, supra, "So I anchored

the pistol with my left hand so I could not, no matter how unsteady I was, make a gesture and discharge it." Furthermore—in the said connection, a further typographical error is apparent in the very next sentence to the one aforesaid, in p. 26, to wit: "I was very careful, gentlemen of the jury, and I pointed it because it was a self-cocker, and I had only slippers on, and if it went off, I would lose a foot because it pointed down straight at the floor." We respectfully submit on the inherent evidence of the context that the word "*and*" in the above sentence should be "*as*." We should then have the following, which makes sense—instead of nonsense. We respectfully submit, to wit, "I was very careful, gentlemen of the jury, as *I* pointed it, because it was a self-cocker, and I had only slippers on, and if it went off I would lose a foot, because it pointed down straight at the floor."

Lastly, in said connection, a final typographical error occurs, which we are pleased to see our distinguished adversaries admit *is* a typographical error, for said gentlemen have made precisely the correction of what said error in the record should be, without by the way, however, drawing attention *to* the said error—for said gentlemen have made precisely the same correction of what said error in the record should be as we ourselves would have made. Said error occurs in the following group of sentences, R. p. 27, to wit: "I strengthened my hold on the pistol. Of course, you can not hold it firmly without a finger on the

pistol, and I had a hold on the trigger, but of course the hammer *went* down. He (Gillard) tried to root the pistol out of my hand with his thumb and I strengthened my grip on the pistol and he found he could not do that. He was doing this after he had swung my hand down towards his wife. With almost supernatural force, the force that comes to all of us in supreme moments, when a woman's life and a baby's life are in danger, I swung it back like that (indicating), but I did not swing it at Gillard's head, I swung it right past, and then a duel took place, a wrist duel, between Gillard and myself, for the possession of the pistol and what was to be done with the pistol."

Our distinguished adversaries endorse our view that in the aforesaid sentence the words "the hammer *went* down" should read "the hammer *was* down." Which emendation of the text gives the following, to wit: "Of course, you can not hold it firmly without a finger on the pistol, and I had a hold on the trigger, but of course the hammer was down." Our distinguished adversaries endorse said emendation of the text, for the said gentlemen say, p. 33 of their brief, to wit: "On the same page he states that although the pistol was a self-cocker, he had 'a hold' on the trigger, but of course the hammer was down."

Said eminent counsel then prepare the way for the launching of an oratorical question, or rather a congeries of oratorical questions, which shall blow the plaintiff out of the water, so to speak. Said learned gentlemen say, pp. 32-33, Brief:

"Plaintiff testified that when Gillard was being held by Money and Grady and when, accordingly, there was no then present danger to the wife, he took his revolver out. * * * Why did he draw the pistol at all at that time if afraid of it? Why draw a pistol and point it out of the window? Why draw it at all, when Gillard was being firmly held by two men, and when the plaintiff knew and was thinking of his gesture-making habit, afraid that he might inadvertently point it toward Gillard and afraid of taking chances with firearms, anyway?" To which we reply as follows: The Record shows why plaintiff drew the pistol at said time. In this very connection, plaintiff says (R. p. 25), I then (after drawing said pistol) said words to this effect: "You are a wife beater, but we are not going to hurt you, and I am going to see that you do not hurt anybody else, Gillard."

Plaintiff wished to intimidate Gillard—wished to overawe Gillard's murderous propensities. That Gillard was an exceedingly aggressive, an exceedingly dangerous proposition, so to speak, the battering which plaintiff's sconce had sustained at the hands of Gillard, supported by the aforesaid heavy iron tongs—the two knock-downs plaintiff had sustained at the hands of Gillard and the tongs—bore eloquent—bore convincing—bore conclusive witness to. Said assertion is supported by plaintiff's language a little further on—a little further on in the development of events—said language, to wit (R. p. 29): "He had no intention of using the pistol. He wanted Gillard to stop.

He knew he was a man of gigantic strength. He could carry enough railroad ties to cover the work of two men, and he did not know whether Money could account for him and was confident Gillard would kill every man in the room; if he made away with Money he would make away with the plaintiff. He wanted to overawe Gillard, wanted him to cease his struggle and to see that he had a gun, and that he, Gillard, even if he overcame Money, would be held up by plaintiff with the gun. Gillard did not know there was a gun in the house, and if he did Money up, and got hold of the tongs he would get plaintiff. This was all to overawe him; let him know he was up against a gun, and discourage him. Plaintiff did not draw his pistol when he was fighting with Gillard because he felt capable of taking care of himself and did not want a pistol to take care of himself only in extreme circumstances. Witness further testified that there was no other firearm in the room, and he did not put a finger on the trigger until after he made the demonstration; he wanted to overawe Gillard; did not draw his pistol when he was fighting Gillard because he felt capable of taking care of himself and did not need a pistol, only in extraordinary circumstances; thought he was man enough to get away with it when Gillard was knocking him down. That meant nothing to him."

We respectfully submit that the above excerpts from the Record answer one and all of our distinguished adversaries' congeries of oratorical questions.

Answers. "Why did he draw the pistol at all at that time if afraid of it?" For, afraid as plaintiff naturally was and is of so deadly a thing as a pistol, plaintiff nevertheless was even more afraid of the possible consequences of Gillard's ignorance of the fact that between plaintiff and a third and possibly final knock-down—possibly fatal—possibly skull-fracturing blow from the tongs in the Herculean hands of Gillard—loomed the small but effective fact of a pistol.

Answers. "Why draw a pistol and point it out of the window?" Because plaintiff was rather naturally loath, we respectfully submit, to point same at his good friend, Colonel Money, since—for the nonce and under the stress of events—Colonel Money and John Gillard were practically one.

Answers—finally—"Why draw it at all, when Gillard was being firmly held by two men, and when the plaintiff knew and was thinking of his gesture-making habit, afraid that he might inadvertently point it toward Gillard, and afraid of taking chances with firearms, anyway?"

Because—although it was very true that at said precise moment Gillard "was being firmly held by two men"—yet it would not, nor *could* not, be ever thus. For even at that very moment plaintiff was looking ahead, and attempting to prepare for the safe-keeping of Gillard until his transfer to the Sheriff of Albemarle County at the hands of a—so-to-speak—*posse* of farmers from "The Merry Mills." Which consummation was only to be achieved by either John Grady's bringing aid

from the farm or—in default of that—leaving Colonel Money to account single-handed for Gillard, while, he, John Grady, sought a rope with which to bind Gillard. In either of said alternatives Colonel Money would be left to cope with Gillard alone. And also because—afraid as plaintiff was and is of taking chances with firearms; yet, and nevertheless—we respectfully submit—plaintiff was even more afraid of taking chances with the tongs-wielding wound-dealing Gillard.

Said learned counsel continue.

"At p. 26 he states that Gillard did not even have his arms raised at the time plaintiff drew his pistol."

The learned counsel confuse "arms" and "forearms" here.

Plaintiff's statement was (R. p. 26): "Then he began to pull Money toward the big Sheraton sideboard, about here (indicating) and he dragged Money. * * * I stepped too near Gillard. He was an extremely foxy proposition, and he had kept his forearms straight to his side when he was struggling. I do not say he never raised them, but he certainly did not have them raised when I drew my pistol, and was standing with the pistol pointing downward."

Said learned counsel continue (Brief p. 33):

"On the same page he states that, although the pistol was a self-cocker, he had 'a hold on the trigger, but, of course, the hammer was down'—as

though that position of the hammer played any part with a self-cocking pistol."

For a gentleman from Texas, ex-Senator Bailey displays a phenomenal lack of familiarity with a revolver. The difference the position of the hammer plays with a self-cocking pistol is nothing less than a *ten-pound* position, since with the hammer of a self-cocking pistol raised, a *few ounces* of a pull will discharge the piece, whereas with the said hammer down something approaching at least a *ten-pound* pull will be required to raise the hammer and discharge the weapon.

Said learned counsel continue—same page:

"He then states that the last thing he remembers was seeing Gillard's 'fingers come down on the barrel like a tarantula. I have killed tarantulas in Arizona and it moved just like that. After that he took my hand and began to squeeze it. That is all I know. The first thing I knew the pistol went off and Gillard sprang into the air and came down a dead man.' (Rec. pp. 26-7.) The witness Grady, on the other hand (Rec. p. 14), testifies, Mr. Chaloner had the pistol in his hand, pointed at Gillard, was standing in front of Gillard, standing still, when Grady left the room for a rope shortly before the shooting."

We respectfully submit that this—the sole and unique material divergence in the testimony of plaintiff's chief witnesses—to wit, Colonel Money and John Grady—has been fully accounted for in our answering brief. *John Grady was excited*

and his observation and memory therefore affected.

Said learned counsel concludes his Statement of Fact thus:

"Money's statement was that, at the time of the active shooting he and Gillard were engaged in a struggle, the latter trying to push him through the door leading into the dining room, edging away towards the door, and possibly getting the better of him, when all of a sudden he 'heard the report of a pistol and realized that Gillard had probably been struck, because his muscles relaxed from my arms.' How Gillard could, while in Money's arms and engaged in the struggle with him which the latter describes, have seized the barrel of the pistol in plaintiff's hands with his fingers coming down upon it 'like a tarantula,' have taken and squeezed plaintiff's hand, and had what the latter calls (Rec. p. 26) 'a wrist duel' with him over its possession while pushing Money through the door and without Money's seeing or knowing anything about it, we submit is so unreasonable and improbable; in fact, so impossible a story as abundantly justified defendant's request that the truth of the article should be left to the Jury for determination, under the instructions asked."

For a considerable space our distinguished adversaries have—so far as the Statement of Fact, at least, is concerned—kept to the straight path. Now, however, we regretfully draw the attention of this Honorable Court to the gross lapses from veracity proved by the following succession of false

statements one after the other, ending up in a lurid display of *suppressio veri*, resting for support upon *expressio falsi*. To wit:

In the first place we find the following highly deceptive statement by the eminent gentlemen on the other side. (Brief, p. 33.)

"Money's statement was." Whereupon follows, *not* what Money's statement *was*, but what Money's statement was *not*, for John Grady had testified regarding his notion of the direction the pistol was pointing. Therefore, we respectfully submit, that to follow same by the words, "Money's statement was that," etc., can have but one object, and that is to mislead the Court and induce it to believe that Money omitted to state the direction the pistol was pointing. For what possible other construction can be placed upon the action of the distinguished gentlemen of the other side in suppressing any and all reference to the fact that Money supported Chaloner as regarded the position of the pistol, and flatly *contradicted* John Grady. (R. p. 16.) "Mr. Chaloner had the pistol in his hand pointing away from Gillard, toward the south window."

Reverting to the statement of the learned counsel for the other side, we find the following (p. 33, Brief): "Money's statement was that, at the time of the active shooting, he and Gillard were engaged in a struggle, the latter trying to push him through the door leading into the dining room, edging away towards the door, and possibly getting the better of him, when all of a sudden he

'heard the report of a pistol and realized that Gillard had probably been struck, because his muscles relaxed from my arms.' "

Before proceeding further we would respectfully draw this learned Court's attention to the language here used, to wit, "the latter *trying* to push him through the door leading into the dining room, *edging* away *towards* the door."

The above is a fairly accurate statement of what actually occurred. And it will be noted—we respectfully submit—that the above language admits of but one construction; namely—in a word—*Hopefulness.* Gillard *hoped* to succeed in achieving his purpose of pushing Colonel Money through the door, for Gillard "was *trying* to push him through the door." Gillard was "edging away *towards* the door," and here we have the grounds for Gillard's hope, "and possibly getting the better of him."

Nothing can be clearer than the fact, we respectfully submit, that it was entirely a case of—so to speak—*in futuro* of the future—*not* of the present—the door being nowhere *near* reached.

In conclusion.

We respectfully submit that *never* was the truth of the ancient adage: "Those who live in glass houses should not throw stones," more emphatically vindicated than in the concluding sentence of the distinguished counsel for the defendant. For they close with the following brief, but powerful peroration which returns upon them with the force of an Australian boomerang, to

wit: *"We submit is so unreasonable and improbable, in fact so impossible a story."*

Applying said peroration to the concluding sentence of the learned counsel for the defendant—purely by way of introduction thereto—we shall now proceed to give said concluding sentence, to wit (Brief, p. 34):

"How Gillard could, while in Money's arms and engaged in the struggle with him, which the latter describes, have seized the barrel of the pistol in plaintiff's hands with his fingers coming down upon it 'like a tarantula,' have taken and squeezed plaintiff's hand, and had what the latter calls (R. p. 26) 'a wrist duel,' with him over its possession, *while, pushing Money through* the door and without Money's seeing or knowing anything about it, we submit is so unreasonable and improbable, in fact, so impossible a story as abundantly justified defendant's request that the truth of the article should be left to the jury for determination, under the instructions asked."

We respectfully submit that the spot of fatal weakness in the above, is that the zeal of the learned counsel has carried them away—wafted them—so to speak—far, very far, from the facts—as set forth by themselves. For we note that the aforesaid condition of Hopefulness concerning Gillard's ability to achieve his purpose of attaining his aim of pushing Money through the door, has—suddenly—*and innocent of the slightest support from* Record—become an *accomplished fact;* and Gillard is pictured by the pen of the eminent

counsel for the defendant as actually and in fact "pushing Money through the door."

Said amusing liberty with the Record affords ample scope for the causes and reasons of the learned counsel's inability to pierce a state of facts as clear as crystal—and as natural, and probable, as said facts are clear.

Of course if counsel are to be permitted to tamper with the record and stultify the very state of facts which they themselves set forth—just one short sentence back of the said boomerang-sentence—it is a comparatively easy matter to *invent* a dilemma, which would make the proved *res gestae* of *Chaloner against the Washington Post Company* impossible of accomplishment.

We shall—at the risk of fatiguing this learned Court—so explicitly set forth the *mise en scène*, that not even the lawyers of the Washington Post can fail to readily and easily grasp its orientation.

The scene of the tragedy at "The Merry Mills" was plaintiff's dining room—a room some fifteen by twenty feet. Said room faced almost due north and south, due east and west. The large Sheraton sideboard ran the entire western side of the room from the south wall to the only door in the dining room *half-way* up its western side. Mrs. Gillard, with a baby in her arms, sat at the end of the large mahogany dining table in the center of the room, facing—she and the baby—due south. On her right sat her son, George, with a small child on his lap. Other small children were about. A long Japanese screen, some seven feet high, ex-

tended the entire length of the dining table, running north and south, immediately west of the dining table. In the final stage of the affray Colonel Money's back rested against the *center* of the said Sheraton sideboard. Colonel Money faced due east. Gillard—held close to Money by the latter—*also* faced due east. The plaintiff was standing within a few feet of the struggling combatants. The plaintiff gradually noticed that Gillard was getting—slowly—painfully—getting the better of Colonel Money in striving for the goal of the door. In plaintiff's anxiety—as he saw Gillard—extremely slowly and only inch by inch—succeed in pushing Colonel Money—a few inches toward the door—plaintiff stepped incautiously near Gillard; and, since Gillard had recently been allowing his forearms to hang straight at his side instead of as formerly—fiercely straining against Colonel Money's bear-like hug around Gillard's arms from behind—plaintiff therefore unwittingly came within reach of Gillard, who at once swung the weapon towards his wife. Chaloner swung the pistol instantly away from Mrs. Gillard and the children, and alongside Gillard's head, but *not* pointing *at*—but past—Gillard—into the west side wall at Gillard's back. Colonel Money's head was on Gillard's shoulder, looking in the same direction Gillard was looking; namely, due east. Gillard had not succeeded in moving Colonel Money—as yet—more than a very few inches, all told, from the center of the Sheraton sideboard towards the door. Money, Gillard and Chaloner

were now so near together that they could almost be covered by a napkin. The "wrist duel," which so puzzles the learned counsel for the Washington Post, was the simplest thing in the world—*to watch*—that is to say. Gillard had his forearms, wrists and hands perfectly free. His *arms* only were pinioned by Money. Therefore when Chaloner came within the swing of Gillard's left forearm, Gillard thrust out his hand, and, seizing the butt and—eventually—the barrel of the revolver with his left hand, attempted to wrest the weapon out of Chaloner's right hand. So soon as said wrist duel began, Gillard desisted from any attempt to push or drag Colonel Money towards the door. All three men stood as stationary as though carved in bronze, so soon as said wrist duel began. Pretty soon Gillard attempted to master the weapon—to squeeze Chaloner's hand so that the revolver would be released. While this was in progress Chaloner noticed the tarantula-like movements of Gillard's powerful fingers down the barrel towards Chaloner's hand. We said, "while this was in progress." But it would be more strictly correct to say: Just *before* the said squeezing of Chaloner's hand by Gillard began, Chaloner noticed Gillard's fingers—so to speak—walking down the barrel towards his hand. Shortly thereafter the tragedy occurred, and Gillard leaped into the air, coming down a corpse.

Colonel Money being on the *right* side of Gillard, and Chaloner and the said wrist duel being on the *left* side of Gillard, and Gillard's head inter-

vening, it is rather extraordinary—we respectfully submit—that the learned counsel for the Washington Post fail to grasp the fact that unless the eyes of Colonel Money had the penetrating quality of the X-ray, Colonel Money could scarcely *see through* Gillard's head, and gather the details of the said wrist-duel in progress on the other side —on the *northern* side of Gillard's skull—whereas Colonel Money was on the *southern* side of Gillard's skull.

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